(23,331)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 756.

RASMUS K. SVOR, PLAINTIFF IN ERROR,

vs.

CATHERINE M. MORRIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 24, 1912.

1 STATE OF MINNESOTA:

Supreme Court, April Term, 1912.

17576.

CATHERINE M. MORRIS, Respondent,
vs.
R. K. SVOR, Appellant.

Return.

Owen Morris, Attorney for Respondent, St. Paul, Minn.
C. A. Fosnes, Attorney for Appellant, Montevideo, Minn.

Filed Mar. 8, 1912.

I. A. CASWELL, *Clerk.*

2 STATE OF MINNESOTA:

Supreme Court, April Term, 1912.

CATHERINE M. MORRIS, Respondent,
vs.
R. K. SVOR, Appellant.

Paper Book.

Complaint.

STATE OF MINNESOTA,
District Court, County of Chippewa:

RUSSELL SAGE, as Assignee in Trust of the Hastings & Dakota Ry. Co., Plaintiff,
vs.
R. K. SVOR, Defendant.

Paragraph I.

For his complaint herein, the plaintiff alleges:

That the Hastings and Dakota Railway Company was duly
3 incorporated under and by an act of the legislature of the Territory of Minnesota, entitled, "An act to incorporate the Hastings, Minnesota River and Red River of the North Railroad Company," approved February 20th, 1857, as amended by an act of the legislature of the State of Minnesota, entitled, "An act to amend an act entitled an act to incorporate the Hastings, Minnesota River and Red River Railroad Company, approved February 20, 1857," approved March 3rd, 1866, and an act of the legislature of the State

of Minnesota, entitled, "An act to amend an act entitled an act to amend an act entitled an act to incorporate the Hastings, Minnesota River and Red River Railroad Company, approved February 26th, 1857, and approved March 3rd, 1866," approved March 9th, 1867, and that its title as first above stated was duly adopted by resolution of its Board of Directors pursuant to the authority in and by said last named act conferred upon them.

II.

That on the 4th day of July, 1866, the Congress of the United States, by an act approved on that day, entitled "an act making an additional grant of lands to the State of Minnesota in alternate sections to aid in the construction of railroads," duly granted to the State of Minnesota for the purpose of aiding in the construction of a railroad from Hastings through the counties of Dakota, Scott, Carver and McLeod to such point on the western boundary of the state as the legislature of the state should determine, every alter-
4 nate section of land designated by odd numbers to the amount of five alternate sections per mile on each side of said road, and not sold, reserved or otherwise appropriated, or of which the right of homestead or preemption had not attached, and that by said act it was also provided that the Secretary of the Interior should cause to be selected for said purpose from public unreserved land in Minnesota, within twenty miles of said road, so much land in alternate sections or parts of sections designated by odd numbers as should be equal to such lands as the United States had already reserved or otherwise appropriated, or to which the right of homestead or preemption settlement had attached as aforesaid. That said act further provided that the land should be subject to the disposal of the Legislature of the State of Minnesota for the purposes aforesaid and no other.

III.

That the legislature of the State of Minnesota by an act approved March 7, 1867, entitled "An act to accept the grant, and in execution of the trust made and created in and by an act of Congress entitled 'an act making an additional grant of land to the State of Minnesota in alternate sections to aid in the construction of railroads in said state,' approved July 4, 1866," being Chapter 9, Special Laws of Minnesota, 1867, accepted the said land grant and granted all the said lands to the Hastings, Minnesota River and Red River of the North Railroad Company, which then was and until March, 1890,
5 continued to be a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota, and had power to construct said line of road and receive said grant.

IV.

The said corporation duly accepted said grant, and its name was thereafter as aforesaid duly changed to the Hastings & Dakota Railway Co., by virtue of the power and authority conferred upon it by the said act of the legislature of Minnesota, approved March 9,

1867. That said company duly surveyed and definitely located said line of road and caused a map thereof to be transmitted by the Governor of said state to the Secretary of the Interior, and that said map was duly approved by him and duly filed in his office on or about the 26th day of June, 1867, and said land grant has ever since been administered with reference to said definite location so shown by said map.

V.

That the time for the construction of said line of railroad was duly extended to 1882, by the Minnesota legislature by acts approved and entitled as follows: An act approved March 4, 1869, entitled, "An act to extend the Hastings & Dakota Railway Company further time for the completion of a certain portion of their railway"; an act approved March 2, 1871, entitled "An act entitled an act to further extend the time for the completion of a certain portion of the Hastings & Dakota Railway, and to amend a certain act relating thereto"; an act approved February 28, 1876, entitled "An
6 act to extend the time for the completion of the unfinished line of railroad of the Hastings and Dakota Railroad Company"; an act approved February 8, 1878, entitled "An act to extend the time for the completion of the unfinished line of railroad of the Hastings & Dakota Railroad Company" and that the time for the completion of this said line of road was so extended to and until the year 1882, and the said line of road was so constructed to completion in the year 1880, and that such construction was accepted by the Governor of the State of Minnesota, and the Governor of Minnesota certified to the Secretary of the Interior in accordance with the provisions of Section Four of said act of Congress approved July 4, 1866, at divers times prior to Jan. 1, 1881, as to each and every section of ten consecutive miles of said road, that the same was duly completed and due certification of such completion was duly made as to each and every mile of said road prior to Jan. 1, 1881.

That all that portion of the Hastings & Dakota Ry. west of Range 40 was accepted on or about Jan. 1st, 1880, and on Jan. 28, 1880, the Governor of Minnesota duly certified the full completion and equipment of said road to the western boundary of Minnesota, and said certification and acceptance included and was of the portion of said road adjacent to and coterminous with the land herein described.

VI.

That the southwest quarter of Section 11, Township 119,
7 of Range 40, Chippewa County, Minn., is more than ten miles and less than twenty miles from said line of road as definitely located; and was on the 26th day of May, 1883, and has ever since been free and clear from any pre-emption or homestead claim thereto, and has never been sold, reserved or otherwise appropriated except as the rights of plaintiff and his predecessors have attached thereto.

VII.

That the United States duly withdrew from settlement for the benefit of said grant on or about the 22nd day of April, 1868, all the land in odd numbered sections more than ten miles and less than twenty miles from said line of definite location, and on May 26, 1883, there was duly caused to be selected by the Secretary of the Interior and selected by said Hastings & Dakota Railway Co., for the benefit of said grant all the lands in said indemnity limits not therefore reserved or excepted from the operation of the grant hereinbefore alleged. That said selection amounted to less than 70,000 acres, and that over 800,000 acres of the original grant and situate within 10 miles of the line of definite location of the line of said road had been theretofore sold, reserved or otherwise appropriated by the United States, or that the right of homestead or pre-emption settlement attached to them prior to the passage of the act making said grant; and that all the lands in the indemnity limits subject to selection were insufficient to fill the losses in the primary
8 limits by over 800,000 acres.

VIII.

That the Hastings & Dakota Railway Company, at the time of the presentation of the said selections to the proper officers of the Interior Department of the United States duly tendered the requisite fees to the proper officers for the filing and subsequent action upon said selections, and also duly tendered full lists of lands lost showing for what tracts in the primary limits of said grant the indemnity selections were made.

IX.

That the tract of land hereinbefore described was in the year 1883, and at the time of said selection and at the time of its re-selection on October 29th, 1891, free public land which the United Staes had not sold, reserved or otherwise appropriated and to which the right of homestead or pre-emption settlement had not attached.

X.

That said Railway Company constructed and had duly completed its said entire line of railway within the time and in the manner prescribed by law, and had the same so completed prior to the 1st day of January, 1880. That in quo warranto proceedings instituted to forfeit the franchise of the Hastings & Dakota Ry. Co., a judgment was duly given and made on the 23rd day of March, 1887. by the Supreme Court of the State of Minnesota, and that thereby the said franchises were forfeited, and the said company dis-
9 solved subject to the statutory period of three years allowed to the company to dispose of its property and wind up its affairs, but with the express recognition of the right of the company to its land grant as earned by the construction of the road.

XI.

That on December 9th, 1889, without fault or neglect on its part the said company was unable to dispose (otherwise than as

hereinafter stated) of all its property and wind up its affairs within the three years provided by statute for so doing, and on that day it duly sold, assigned, conveyed and transferred to this plaintiff in trust for the benefit of the stockholders of said company, all of its property rights and assets including its land grant not theretofore disposed of, and including the tract of land described in this complaint and all right it had and claimed thereto and to conveyances of any of said lands from the State of Minnesota or from the United States and all right to assert, prosecute and maintain all claims and actions, both in the courts and in the departments and offices of the United States, in relation thereto, and to sell and convey all lands received by him as such trustee and distribute the proceeds thereof among the stockholders of said company, according to their respective rights thereto; and that this plaintiff has duly accepted such trust and is acting as such trustee.

XII.

That by reason of certain objections made to the selections
10 of 1883, this plaintiff, without admitting the validity of such objections and without waiving any rights gained by said Railway Company under its said selections of 1883 caused a re-selection to be made of the same lands which had been made in 1883, as aforesaid, and for the same purpose as the selections of 1883 heretofore referred to, and the said re-selections were made on October 29, 1891, and the tract of land described in this complaint was duly re-selected by plaintiff on said last mentioned date. That thereafter certain of the tracts selected in 1883 and re-selected in 1891 as aforesaid, and, among them the tract described in this complaint were duly certified by the Secretary of the Interior to the State of Minnesota, in compliance with and for the purposes of the said act of July 4, 1866, and said list was on Mar. 29, 1899 duly submitted to and approved by the Secretary of the Interior and the lands therein contained included the tract described in this complaint and said certification was, and was therein stated to be, for the benefit of plaintiff, as the trustee of the Hastings & Dakota Ry. Co.

XIII.

That the plaintiff is and ever since the 10th day of April, 1897, prior to which time the certificate hereinbefore mentioned was executed and delivered to the Governor of the State of Minnesota and filed with the Auditor thereof, has been the owner and entitled to the immediate possession of the tract of land described in this com-
plaint and that the defendant prior to said day wrongfully
11 and unlawfully entered into the possession of said premises and real estate, and now is, and ever since his said unlawful entry without right or title has been in the wrongful and unlawful possession thereof and has wrongfully and unlawfully withheld and still withholds the same from the plaintiff. That the value of the rents and profits of the said land for and during the time that the same have been so wrongfully and unlawfully withheld from this plaintiff, is the sum of $20.00.

Wherefore, the plaintiff demands judgment against the defendant for the restitution of the land and premises herein mentioned and for said damages and for the costs and disbursements of this action.

LYNDON A. SMITH,
Attorney for Plaintiff, Montevideo, Minn.

Endorsed: Filed June 6, 1898. Elias Jacobson, Clerk.

State of Minnesota, District Court, County of Chippewa, 12th Judicial District.

CATHERINE MARY MORRIS, Plaintiff,
vs.
R. K. SVOR, Defendant.

Amended Answer.

1.

The defendant for his amended answer admits the matters
12 alleged in the first paragraph of the complaint.

2.

Defendant denies that the time for the construction of said railroad was ever extended, as claimed in paragraph five of said complaint, and denies that said railroad was constructed within the time limited by the Congressional grant of July 4th, 1866, or the collateral grant made by the legislature of the State of Minnesota, under Chapter 9 of the Special Laws of said state for year 1867, whereby said Congressional grant was transferred to said Hastings & Dakota Railway Company. Defendant admits that by the various acts referred to in said paragraph five of the complaint the legislature of the State of Minnesota attempted to extend the time for the completion of said road as therein alleged, but denies that the legislature of said state had any power from Congress or otherwise to extend the time limit for said construction, as declared in said Congressional grant.

3.

Defendant admits that the land described in the complaint is more than ten miles, and less than twenty miles, from the line of said railroad as so definitely located, as alleged in paragraph six of said complaint, but denies all the other allegations of said paragraph.

4.

Defendant also admits that on or about April 22nd, 1868, all the land in odd numbered sections within the limits of said indemnity grant was withdrawn from settlement, so far as such with-
13 drawal could be effected by the ex parte direction of the Commissioner of the General Land Office, but denies that said

order of withdrawal was valid or effectual to prevent the attachment to said land of the right of this defendant as a homestead claimant, as hereinafter set forth, and defendant alleges further in that behalf that said order of withdrawal so made by the commissioner of the general land office as aforesaid was expressly revoked and annulled by direction of the Secretary of the Interior, on or about May 26th, 1891.

Defendant further denies that on May 26th, 1883, or at any other time, there was duly selected or caused to be selected by the Secretary of the Interior, or by said Hastings & Dakota Railway Company all or any of the lands within said indemnity limits not theretofore reserved or excepted from the operation of said grant, as alleged in paragraph seven of said complaint and denies that at any time either before or since that date the Secretary of the Interior in any manner, either directly or indirectly, advised, participated in, countenanced or approved any selection of the lands described in the complaint by said Hastings & Dakota Railway Company, or by the plaintiff in this action; and on the contrary thereof alleges that on or about May 26th, 1883, as defendant is informed and believes, said Hastings & Dakota Railway Company made an entirely imperfect, insufficient and unwarranted attempt to select the lands within said in-
14 demnity limits of said grant and that in said attempted selection neither said Secretary of the Interior nor any other officer of the United States co-operated or in any manner participated; that said attempted selection did not conform to the rules and requirements prescribed by the Secretary of the Interior, and then in force as to the method of making indemnity selections by and on behalf of land grant railway companies; that no specification of losses of any lands within said indemnity limits were sought to be taken was furnished by said company; that no showing was made in connection with said attempted selection that any of the lands within said place limits had been lost; that at that time there had been no computation or ascertainment of said losses in the place limits of said grant by the Interior Department. And defendant further denies that said Hastings & Dakota Railway Company tendered any fees to said Land Officers to cover their proper charges for the examination and entry by said officers of said selections, as alleged in paragraph eight of said complaint, or otherwise.

6.

Defendant further alleges that thereafter, on the 23rd day of October, 1891, said attempted selection by said Hastings & Dakota Railway Company was duly taken up and considered by the Secretary of the Interior and the same was on said date by said Secretary of the Interior rejected, disapproved and cancelled for its numerous imperfections and insufficiencies.

15 7.

Defendant denies that the said Hastings & Dakota Railway Company constructed or completed its line of road within the time or in the manner provided by law, as alleged in paragraph ten in said

complaint, or that it ever constructed or completed the line of said road at all, west of the village of Glencoe, in the County of McLeod, in said state, either as alleged in said paragraph numbered ten of the complaint or otherwise; on the contrary defendant alleges, on information and belief, that on or about July 1st, 1872, after said Hastings & Dakota Railway Company had constructed its said line of railway from Hastings in said state to said Village of Glencoe, in the County of McLeod, in said state, a point about 100 miles east of the point in said railroad opposite to the land described in the complaint, said Hastings & Dakota Railway Company in violation of its charter, and in violation of the act of the legislature of said state by which said land grant was transferred to it, sold its said line of railway as constructed to said Glencoe, and projected to the city of Ortonville, at the foot of Big Stone Lake, the ultimate western terminus thereof, to the railroad company organized under the laws of the State of Wisconsin, then known as the Milwaukee & St. Paul Railway Company, now known as the Chicago, Milwaukee & St. Paul Railway Company, and that said road was built from said Glencoe to the said city of Ortonville by said Milwaukee & St. Paul Railway Company, and not by said Hastings & Dakota Rail-
16 way Company, and that said Hastings & Dakota Railway Company retained a nominal connection with said construction of said line of road, after the said sale thereof, solely for the fraudulent purpose of claiming from the State of Minnesota, and from the United States, the lands included in said land grant along the line of said road from said Village of Glencoe to the said City of Ortonville, a distance of about 120 miles, which said Hastings & Dakota Railway Company would rightfully have been entitled to had it constructed said railway in the time and manner provided by said grant, but which lands it forfeited and lost by reason of its failure to comply with said grant, and by its failure to build said road at all.

8.

Defendant admits that as alleged in sand paragraph ten of the complaint in quo warranto proceedings in Supreme Court of the State of Minnesota, the judgment of said court was duly given and entered on the 23rd day of March, 1887, forfeiting the charter and all the corporate rights, franchises and privileges of said Hastings & Dakota Railway Company because of its violation and non-user of its said corporate franchise; but denies that any question as to the rights of said company to any portion of said land grant was involved in said quo warranto proceedings either directly or indirectly, or that any decision was made therein with reference to the same, as in that behalf alleged in said complaint; but admits that
17 the cancellation of said corporate franchise was subject to the three statutory periods allowed to Minnesota corporations whose charters are forfeited within which to wind up their affairs. Defendant further alleges that said Hastings & Dakota Railway Company never applied to any district or other court of said state for the appointment of a receiver to continue the process of winding up its affairs after the expiration of said statutory three years, and for want

of the appointment of such receiver such corporation entirely ceased to exist, and all of its property rights terminated on March 23rd, 1890.

9.

Defendant admits that on or about December 9th, 1889, and within the three years allowed to said corporation by law to wind up its affairs, it assigned to Russell Sage, as trustee, all of its property, including all of its rights to said land grant, including the lands in place and within said indemnity limits; but defendant alleges that all the right said corporation then had or possessed to the lands within said indemnity grant, including the land in controversy in this action, was whatever right arose out of said imperfect and insufficient selection thereof made by said company on said May 26th, 1883, which selection was then pending undecided, before the said Secretary of the Interior, which said selection was as aforesaid afterwards cancelled and rejected on October 23rd, 1891, by said Secretary of the Interior.

18

10.

Defendant admits that after the rejection and cancellation by said Secretary of the Interior on October 23rd, 1891, of said selection of May 26th, 1883, made on behalf of said Hastings & Dakota Railway Company, said Russell Sage, on October 29th, 1891, pretending to act by virtue of some authority conferred on him by said Hastings & Dakota Railway Company, which was then entirely defunct, by reason of the assignment to him on December 9th, 1889, of its property in trust as aforesaid, made a new pretended selection, defendant alleges, was entirely nugatory because of said prior dissolution and complete termination of said Hastings & Dakota Railway Company, which corporation alone, during its existence, possessed the right to initiate a claim to said land by selection of the same to make up for lands lost in place. Defendant further alleges that said last named pretended selection of said lands was, as to the lands described in the complaint herein, never recognized as valid, and was never approved, but on the contrary, said last mentioned selection was as to the lands involved herein expressly disapproved and disallowed by the Secretary of the Interior.

11.

Defendant further answering alleges that he is and at all times since July, 1885, he has been a citizen of the United States, and as such was fully qualified to make a homestead entry upon any of the free public lands of the United States subject to the operation
19 of the homestead laws of the United States; that — all times mentioned in the complaint and answer the land described in the complaint was free public lands of the United States, which had not been sold, reserved or otherwise appropriated, but which during all of said time was subject to entry by any qualified homestead claimant. That prior to the year 1886, the defendant entered upon the tract of land described in the complaint with the intent in

good faith to make entry thereof as a government homestead under the United States homestead laws, being advised that whatever claim had theretofore existed to said land in favor of said Hastings & Dakota Railway Company was or would soon be entirely extinguished, and that there would then be nothing in the way of allowance of his homestead entry therefor in the United States Land Office. That at the time of said settlement thereon defendant constructed thereon a house, barn and other buildings and improvements reasonably worth and of the value of two thousand dollars ($2,000.00) and then and there established his residence thereon, which he has continued without interruption since. That the defendant duly offered a homestead application for said land in due form of law at the proper local United States Land Office, accompanied by the tender of all necessary fees, but that the same was disallowed on the pretended claim that it had been selected as indemnity lands by the Hastings & Dakota Railway Company; that said pretended selection was void and of no effect, and that the rejection of his homestead application was erroneous. That the defendant before any rights of said Railway Company had attached to said land made repeated applications for homestead entry thereon. That the defendant has always maintained and still maintains that he has a right to enter said land as a homestead, and that the plaintiff has no right, title or interest thereon, but that the defendant's rights are superior.

12.

Further answering the defendant denies each and every other allegation contained in the complaint.

Wherefore, defendant asks that the plaintiff take nothing by this action, but that plaintiff's complaint be dismissed, and that the defendant recovers his costs and disbursements herein.

C. A. FOSNES,
Attorney for Defendant.

Endorsed: Filed June 6th, 1910. Elias Jacobson, Clerk.

(Title.)

Reply.

The plaintiff for her reply to the amended answer of the defendant denies each and every allegation thereof except as hereinafter specifically qualified or admitted.

The plaintiff admits that the Hastings and Dakota Railway Company never applied to any district or other court of said state for the appointment of a receiver to wind up its affairs.

The plaintiff for further and supplemental reply to the answer of the defendant herein alleges that the exact issues involved in this action were involved in an action prosecuted by the defendant in the United States land office and the Department of the Interior of the United States for the purpose of obtaining an allowance of an

application by him to enter as a homestead the land described in the complaint herein, which action was contested and defended by the said trustee of the Hastings and Dakota Ry. Co. That said application was made by this defendant, in due form, January 15th, 1904; that said application was rejected by the United States Land Office and on August 1st, 1904, the defendant appealed from said decision and rejection and alleged in said appeal that he made homestead application for said land in December, 1885, and that in 1888 he made and had ever since continued settlement and residence on said land, and on said appeal it was duly decided and adjudged by the Secretary of the Interior that said land was at the time of said application of defendant, made December, 1885, to enter said land as a homestead, withdrawn from settlement, and that said land was restored to settlement in 1891, and that defendant did not for a period of nearly thirteen years after such revocation of withdrawal and seven years after approval of the land to the trustee of the Hastings and Dakota Company, attempt to enforce his settlement rights by applying to make entry of said land as homestead, and that
22 defendant did commit laches, and he did by such laches forfeit and waive his right, if any, in and to and to claim said land or any interest therein.

That by said decision and adjudication, which was duly made, given and rendered as aforesaid, by the Secretary of the Interior Department of the United States on October 17th, 1905, the matters and facts in this action, litigated between said defendant and the then predecessor in interest of this plaintiff were finally determined on the merits and the defendant is barred thereby from maintaining his defense interposed herein by answer to the causes of action contained in plaintiff's complaint herein, and said determination remains in full force and effect.

Wherefore plaintiff demands judgment as prayed for in her complaint herein.

OWEN MORRIS AND
LYNDON A. SMITH,
Attorneys for Plaintiff,
Montevideo, Minnesota, and St. Paul, Minnesota.

Endorsed: Filed June 11th, 1910. Elias Jacobson, Clerk.

(Title.)

Findings of Facts and Order for Judgment.

This cause was regularly upon the June, A. D. 1911 gen-
23 eral term calendar of said court, and was by agreement then, and subsequently, tried by the Court, a jury being waived, the plaintiff also waiving any right to recovery of damages.

From the pleadings, evidence, stipulations and admissions of the parties the Court finds the following

Facts.

1. Since the commencement of this action and the former trials thereof, the original plaintiff, Russell Sage, has departed this life and Catherine Mary Morris has been duly substituted as the plaintiff in this action, and she has succeeded to whatever right, title and interest the said Russell Sage, as Assignee in Trust of the Hastings and Dakota Railway Company, at any time owned and held in the land described in the complaint.

2. The Hastings and Dakota Railway Company was duly incorporated as alleged in paragraph one of the complaint.

3. The Congress of the United States by an Act approved on the 4th day of July, 1866, granted to the State of Minnesota for the purpose of aiding in the construction of a railroad from Hastings to the western boundary of the state, every alternate section of land designated by odd numbers to the amount of five alternate sections per mile on each side of said road, and not sold, reserved or otherwise appropriated, or to which the right of homestead or pre-emption had not attached, within twenty miles of said road, which land should be subject to the disposal of the legislature of the State of Minnesota for said purpose; all as alleged and more particularly set forth in paragraph two of the complaint.

4. The legislature of the State of Minnesota by an act passed and approved for that purpose in March, 1867, accepted the said land grant and granted all the lands to the Hastings, Minnesota River and Red River of the North Railway Company, which was then an existing corporation with the power to construct the road above mentioned and to receive said grant which it accepted, and said corporation subsequently became known, by change of name, as the Hastings and Dakota Railway Company and said grant is known as the Hastings & Dakota Land Grant. The company surveyed and definitely located its line of road and caused a map thereof to be transmitted to the Governor of Minnesota and to the Secretary of the Interior, which map was duly approved and the land grant has been administered with reference to the map of definite location. The entire line of said road was finally constructed and completed in the year 1880, and the completion of the road was duly accepted and its completion duly certified to the Secretary of the Interior prior to January 1st, 1881, all as more fully and particularly alleged and set forth in paragraphs three, four and five of the complaint.

5. The land involved in this action, to-wit: The southwest quarter of Section 11, Township 119, Range 40, Chippewa County, Minnesota, is not within the place limits of said land grant, but is included within the indemnity limits of the line of railroad as located and constructed to completion, and the land was withdrawn by the proper authority from settlement for the benefit of said grant of July 12th, 1866, and also by modified order of April 22nd, 1868. On the 26th day of May, 1883, there existed a deficiency in the place limits of the grant and because thereof the Hastings & Dakota Railway Company for whose benefit the grant

was made, attempted to select the land in question, together with other lands within the indemnity limits of the grant, but the selection was wholly rejected.

6. By a judgment of the State Supreme Court, given and entered March 23rd, 1887, the charter and franchises of the Hastings & Dakota Railway Company was adjudged forfeited, and the corporation dissolved, subject, however, to the statutory period three years allowed the company to wind up its affairs, and by its deed of trust of date December 9th, 1889, the company conveyed and assigned to Russell Sage all its property and all its rights and interest in the land in question, and all lands embraced within the land grant in trust for the benefit of all the stockholders of the company, the deed in terms granting and giving to him the right to maintain and prosecute all actions necessary to carry out the purpose of the trust and assignment, which trust was accepted by him, and he continued to act as such trustee until his death, which occurred in July, 1906. No receiver of the company was, however, at any time appointed.

7. On May 28th, 1891, pursuant to instructions from the
26 Secretary of the Interior, the Commissioner of the General Land Office directed the officers of the proper local land office that, after giving notice, they should restore to the public domain and open to settlement all the lands in the indemnity limits, of said land grant, "Not embracing selections heretofore made and applied for by said company." The selection of May 26, 1883 of the land in question which selection is mentioned in finding No. 5 was pending on appeal until Oct. 23, 1891.

8. After the rejection of the attempted selection made by the Hastings & Dakota Railway Company in 1883 of the land here in question as well as other lands, Russell Sage, acting ostensibly under and by virtue of the powers vested in him, by the said deed of trust, and not otherwise, assumed to make another selection on the 29th day of October, 1891, of the land in suit, together with other lands within the indemnity limits of said grant, claiming and alleging that all thereof was then vacant and unappropriated, which selection was in due form and in full compliance with the rules of the Land Department, and which selection was duly certified as by the law required, and was duly approved by the Secretary of the Interior on March 29th, 1897, and whatever title was acquired by said selection under said land grant to the land in question, was acquired by and vested in the said Russell Sage as assignee in trust of the Hastings & Dakota Railway Company. And the said Sage never acquired any other right to any of the land herein mentioned by virtue of any
27 other selection.

9. This action was commenced by the service of the summons and complaint herein upon the defendant on October 23rd, 1897; that subsequent to the year 1902 and prior to the death of Sage in 1906, the present plaintiff acquired and there was vested in her and she is now the owner of whatever right, interest and title said Sage, as assignee in trust, had or at any time held in and to the premises in question, but whatever right she thus acquired in or to said premises was acquired with full, ample and sufficient notice and

knowledge of the defendant's claim of right to hold the land under the homestead laws, and that he asserted a right to the title and ownership thereof, as against said Sage and all persons claiming under him, or under the land grant.

10. In the year 1883 the defendant duly declared his intention to become a citizen of the United States, and was after that date in all respects qualified and entitled to make homestead entry under the laws of the United States, and on the 17th day of December, 1885, the defendant under the name of Rasmus K. Svor, which is his true name, offered at the proper land office a homestead entry in due form for the land in dispute and tendered the requisite fees, but all of which was refused by the proper officers of the local land office because the tract applied for was within the indemnity limits of the St. Paul and Pacific as well as within the indemnity
28 limits of the Hastings & Dakota Railway Company's land grants, and had been withdrawn from settlement, and because of an attempted selection made by the Hastings and Dakota Railway Company which was then pending on an appeal, and because the defendant did not show settlement and residence on the land prior to the said selection, from which decision the defendant did not appeal.

11. On June 11th, 1887, the defendant was duly admitted to citizenship and he became a duly naturalized citizen of the United States and has ever since remained so. After the decision of the land office referred to in the preceeding finding had become final, and in the early part of the year 1888 the defendant for the first time entered and settled upon the land in question and erected thereon a dwelling house and broke up fifteen acres of the land, and from thence until now he has continued to reside on said land and has made his home there. And from year to year he continued to improve the premises so that in September, 1898, when this action was first tried, there was upon the premises a dwelling house, a substantial granary, a machine shed, two stables, all exceeding in value $2000, a grove, and one hundred and fifteen acres of land was under cultivation, and practically all of which improvements were upon the land at the time of the commencement of this action.

And his residence and improvements were at all times sufficient to comply with the requirements of the homestead laws of the United States.

29 12. After the first trial of this action in this court, which trial resulted in a judgment being entered and given in the year 1902 in favor of the plaintiff, Russell Sage, and against the defendant, he, on January 15th, 1904, and for the first time since he made settlement upon the land, tendered his homestead application to the proper office for said tract, which application was rejected by the local officers on the ground that a selection of the tract had been approved to the Hastings & Dakota Railway Company. From this action of the local officers the defendant appealed to the Commissioner of the General land office, who affirmed the decision of the local office, and the defendant thereupon appealed to the Secretary of the Interior, who, on October 17th, 1905, affirmed the de-

cision, substantially on the ground that the defendant was guilty of laches, and denied him a hearing in proof of his allegations of settlement and residence on the land.

13. At the time of the selection made by Sage, in 1891, which was approved in 1897, the land in question was not vacant, but was then occupied by the defendant, who has continually occupied and resided upon the land with his family since 1888, and he does still so reside upon and occupy the same, and he entered upon and went into possession of the land with intent to enter upon and claim the same as a homestead, and with a view of making the same his home, and he has consistently and persistently claimed the right to hold and occupy the same as a homestead and has constantly im-
30 proved the same, and at all times he has asserted a right thereto. The defendant has never occupied any other land as owner, and does not own, nor has he any title to any other land.

And as Conclusions of Law Thereupon.

That plaintiff is entitled to judgment decreeing her to be the owner of the land in the complaint and in the foregoing findings described, and that she is entitled to the immediate possession and restitution thereof.

Let judgment be entered accordingly after the lapse of thirty days from notice of the filing hereof.

Dated August 23rd, 1911.

G. E. QVALE,
District Judge.

Endorsed: Filed Aug. 13, 1911. Elias Jacobson, Clerk.

Judgment.

This cause being at issue on the calendar of this court for the general term thereof, commencing the 5th day of June, 1911, came regularly for trial at said term, by the court without a jury, whereupon there was evidence introduced, stipulations made, and proceedings had upon the trial, and thereafter the same was duly submitted to the court for its consideration and determination, and said court having delivered its findings of fact and conclusions of law, and order in writing, which were filed with the clerk of this court on August 30th, 1911, whereby it finds as facts that the defendant in the early part of the year 1888 entered and set-
31 tled upon the land described in the complaint, to-wit: The southwest quarter of Section eleven (11), in Township one hundred nineteen (119) North of Range forty (40) west of the fifth principal Meridian, and situate in Chippewa County, Minnesota, and ever since has been and now is in the actual possession and occupancy thereof, and as conclusions of law that plaintiff is entitled to judgment decreeing her to be the owner of the said lands in the complaint and in the decision of the court described, and that she is entitled to the immediate possession and restitution thereof, and

ordered judgment accordingly after the lapse of thirty days from notice of the filing thereof, and said notice of filing having been duly made upon the attorney of the defendants on the 5th day of September, 1911, as appears by the files herein.

Wherefore upon motion of Owen Morris, attorney for the plaintiff herein, it is adjudged that the plaintiff, Catherine M. Morris, is the owner of the land described in the complaint, namely, the southwest quarter of Section eleven (11), in Township one hundred and nineteen (119), North of Range forty (40) west of the fifth principal Meridian, situate in Chippewa County, Minnesota, free from all claims thereto, or interest therein, on the part of the defendant, and that plaintiff, Catherine M. Morris, do have and recover of the defendant, Rasmus K. Svor, the possession of said premises described in the complaint, herein, and also have and recover of said defendant her costs and disbursements of this action taxed at fifteen
32 and 65-100 dollars.

Dated December 19th, 1911.

ELIAS JACOBSON,
Clerk of the District Court, Chippewa County, Minnesota.

Notice of Appeal to Supreme Court.

To Owen Morris, Esq., Attorney for the above named Plaintiff, and to Elias Jacobson, Clerk of said District Court:

Please Take Notice: That the above named defendant hereby appeals to the Supreme Court of the State of Minnesota, from a judgment rendered by the said District Court entered herein, on the 19th day of December, A. D. 1911, in favor of the plaintiff, against the defendant, adjudging and decreeing plaintiff to be the owner of all the property described in the complaint and from the whole thereof.

Dated this 18th day of Jan., A. D. 1912.

C. A. FOSNES,
Attorney for Defendant.

Due service admitted Jan. 19, 1912.

OWEN MORRIS,
Att'y for P't'ff.

" " " Feb. 1, 1912.

ELIAS JACOBSON,
Clerk Dist. Court.

Bond in Appeal duly filed.

33 *Clerk's Certificate of Copy of Record.*

STATE OF MINNESOTA,
County of Chippewa, ss:

District Court, Twelfth Judicial District.

CATHERINE MARY MORRIS, Plaintiff,
vs.
RASMUS K. SVOR, Defendant.

Certified Copy of Record.

I, Elias Jacobson, Clerk of the District Court above named, do hereby certify that I have compared the foregoing and attached paper writing with the original complaint, answer, reply, findings of facts and order for judgment, judgment and notice of appeal with admission of service, in the action therein entitled, now remaining of record in my office, and that the same is a true and correct copy and transcript of said original, and the whole thereof.

Witness my hand and seal of said Court, at Montevideo, this 16th day of February, A. D. 1912.

[SEAL.] ELIAS JACOBSON, *Clerk.*

34 STATE OF MINNESOTA,
County of Chippewa, ss:

District Court, Twelfth Judicial District.

I, Elias Jacobson, Clerk of the District Court, of Chippewa County and State of Minnesota, do hereby certify and return to the Honorable, the Supreme Court of said State, that I have compared the foregoing printed paper book with the original complaint, answer, reply, findings of fact and order for judgment, judgment and notice of appeal with admission of service, in the action therein entitled, now remaining of record and on file in my office, and that the same is a true and correct copy and transcript of said original and the whole thereof.

Witness my hand and seal of said court, at Montevideo, in said county this 7th day of March, A. D. 1912.

[SEAL.] ELIAS JACOBSON,
Clerk District Court, Chippewa County, Minn.

35 17576. State of Minnesota, Supreme Court, April Term. 1912. Catherine M. Morris, Respondent, vs. R. K. Svor, Appellant. Assignment of Errors. Owen Morris, Attorney for Respondent, St. Paul, Minn. C. A. Fosnes, Attorney for appellant, Montevideo, Minn. Filed Apr. 1, 1912. I. A. Caswell, Clerk.

36 *Assignment of Errors.*

The Court below erred:

1. In ordering that judgment be entered in favor of plaintiff.
2. The conclusions of law and judgment are not justified by the findings of fact.
3. In holding that Russell Sage had authority in 1891 to select the land in question as assignee in trust of the Hastings & Dakota Railway Co.
4. In holding that the Hastings & Dakota Railway Co. existed for any purpose after March 23, 1890.
5. In holding that in 1891 when occupied by appellant, a qualified homesteader, the land was subject to selection by Russell Sage as assignee as indemnity lands.
6. In holding that the selection of the railway company was superior to the homestead applications made by appellant in 1885 and again in 1904.

C. A. FOSNES,
Attorney for Appellant.

37 17576.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1912.

No. 132.

CATHERINE M. MORRIS, Respondent,
v.
R. K. SVOR, Appellant.

Syllabus.

1. The legal title to land carries with it the right of possession, and it is sufficient, under section 4073, R. L. 1905, without actual possession thereof within fifteen years, to maintain an action to recover the land from one in possession thereof without right or title.
2. A deed by a railway corporation made within three years next after it had been dissolved by the judgment of this court, in trust for the benefit of its stockholders, vested in the trustee the right to make selections of indemnity lands as fully as the corporation could have done if it had not been dissolved.
3. The findings of fact sustain the conclusion of law and judgment of the trial court to the effect that the plaintiff is the owner of the land here in question and entitled to its possession by virtue of a selection thereof by such trustee as indemnity land, the approval of the federal land department, and a conveyance by the trustee to the plaintiff.

Judgment affirmed.

38 17576.

State of Minnesota, Supreme Court, April Term, A. D. 1912.

No. 132.

CATHERINE M. MORRIS, Respondent,
v.
R. K. SVOR, Appellant.

Opinion.

Appeal by the defendant from the judgment of the district court of the county of Chippewa adjudging that the plaintiff was the owner of the southwest quarter of section eleven, in township one hundred and nineteen, range forty, west, and that she recover possession thereof. This is the second appeal in this case. The first one was by the plaintiff from a judgment dismissing her action, which was reversed by this court. Morris v. Svor, 114 Minn., 303. The second trial of the case was by the court without a jury, and findings of fact and conclusions of law were made which, so far as here material, are to the effect following:

1. The land which is the subject matter of this action is within the indemnity limits of the Hastings and Dakota Railway Company, hereafter referred to as the Railway Co., by virtue of a federal land grant of July 4, 1866, to the state of Minnesota for the purpose of aiding in the construction of a railroad from Hastings to the western boundary of the state. The Railway Company acquired by grant from the state the land grant so made, definitely located
39 its line of road, and made a map thereof, which was transmitted to the Governor of Minnesota and the Secretary of the Interior and duly approved by each of them.

2. The land grant has been administered with reference to the map of definite location. The entire line was constructed and completed in the year 1880, and was duly accepted and certified to the Secretary of the Interior prior to January 1, 1881.

3. The land here in question is not included within the place limits of the grant, but is within the indemnity limits of the line of the Railway Company. The land was withdrawn from settlement for the benefit of the grant of July 12, 1866, and by a modified order of April 22, 1868. On the 26th day of May, 1883, there existed a deficiency in the place limits of the grant, and because thereof the Railway Company, for whose benefit the grant was made, attempted to select the land in question, together with other lands within the indemnity limits of the grant, but the selection was wholly rejected.

4. On March 23, 1887, the franchise of the Railway Company was forfeited by the judgment of this court, and the corporation dissolved, subject, however, to the statutory period of three years allowed the company to wind up its affairs. December 9, 1889,

the Railway Compay, by its deed of trust, conveyed and assigned to Russell Sage all its property and all its rights and interest in the land in question, and all lands embraced within the land grant in trust for the benefit of the stockholders of the company. The deed in terms gave to him the right to maintain and prosecute all actions necessary to carry out the purpose of the trust. He accepted the trust and continued to act as such trustee until his death in July, 1906. No receiver of the company was, however, at any time appointed.

40 5. On May 28, 1891, pursuant to instructions from the Secretary of the Interior, the Commissioner of the General Land Office directed the officers of the proper local land office that, after giving notice, they should restore to the public domain and open to settlement all the lands in the indemnity limits of the grant, "not embracing selections heretofore made and applied for by said company." The selection of May 26, 1883 of the land in question was pending on appeal until October 23, 1891.

6. After the rejection of the attempted selection of May 26, 1883, Russell Sage, the trustee under the trust deed, acting by virtue of the powers thereby vested in him, assumed to make another selection on October 29, 1891, of the land in suit, together with other lands within the indemnity limits of the grant, claiming and alleging that all thereof was then vacant and unappropriated, which selection was in due form and in full compliance with the rules of the Land Department. This selection was duly certified and approved by the Secretary of the Interior on March 29, 1897, and whatever title was acquired by such selection to the land in question, was acquired by and vested in Russell Sage as assignee in trust of the Railway Company. He never acquired any other right to the land by virtue of any other selection. At the time this selection and approval was made, the land was not vacant but was then, and has been since 1888, actually occupied by the defendant and his family, claiming it as a homestead.

7. The plaintiff acquired and there was vested in her and she is now the owner of whatever right and title Sage, as assignee in trust, had or at any time held in and to the premises in question, but whatever right she thus acquired was acquired with

41 notice of the defendant's claim of right to hold the land under the homestead laws, and that he asserted a right to the title thereof, as against all persons claiming under the land grant.

8. In the year 1883, the defendant duly declared his intention to become a citizen of the United States, and was after that date in all respects qualified and entitled to make homestead entry under the laws of the United States, and on the 17th. day of December, 1885, he offered at the proper land office a homestead entry in due form for the land and tendered the requisite fees, all of which was refused by the officers of the local land office because the tract applied for was within the indemnity limits of the St. Paul and Pacific as well as within the indemnity limits of the Railway Company's land grants, and had been withdrawn from settlement, and because of the attempted selection made by it which was then

pending on appeal, and because the defendant did not show settlement and residence on the land prior to the said selection, from which decision the defendant did not appeal.

9. On June 11, 1887, the defendant became a duly naturalized citizen of the United States. After the decision of the land office rejecting his proposed entry had become final, and in the early part of the year 1888, the defendant for the first time entered and settled upon the land and erected thereon a dwelling house and broke up fifteen acres of the land, and from thence until now he has continued to reside on the land and has made his home there, and made improvements thereon of the value of $2,000. His residence and improvements were at all times sufficient to comply with the federal homestead laws.

10. The defendant, on January 15, 1904, and for the first time since he made settlement upon the land, tendered his home-
42 stead application to the proper office for the land, which was rejected by the local officers on the ground that a selection of the tract had been approved to the Railway Company. He appealed to the Commissioner of the General Land Office, who affirmed the decision. Thereupon he appealed to the Secretary of the Interior, who, on October 17, 1905, affirmed the decision, substantially on the ground that the defendant was guilty of laches, and denied him a hearing in proof of his allegations of settlement and residence on the land.

The conclusion of law based upon the facts stated was a direction for judgment in plaintiff's favor, that she was the owner of the land and entitled to the possession thereof. The record contains no settlement case and the sole question is whether the conclusion of law is sustained by the facts found.

1. The first contention of defendants to be considered is, that Sage, as trustee, had no authority to make the selection in 1891, or at any other time after three years from the entry of the judgment in this court forfeiting its franchise. All the rights of the Railway Company in the land were transferred by it to Sage before the expiration of the three years after its dissolution, and vested in him the right to make selection of indemnity lands as the Railway Company would have had if it had not been dissolved. The question is not an open one, it having been determined adversely to the contention of the defendant.

Sage v. Crowley, 83 Minn., 314;
Norton v. Frederick, 107 Minn., 36:

2. It is further urged by defendant that as neither the plaintiff nor her predecessors in interest have had possession of the land within fifteen years next before the commencement of the action, she cannot maintain it. The claim is without merit, for the legal title to real property carries with it the right of possession
43 which is sufficient under section 4073, R. L. 1905, to recover possession thereof from one in possession without right or title.

Norton v. Frederick, 107 Minn., 36.

3. The only other claim of the defendant is to the effect that he was in the actual possession of the land with intent to claim it as a homestead on October 29, 1891, when the Sage selection was initiated, and by virtue of such possession his homestead rights had attached, hence the land had then ceased to be public land and could not be selected as indemnity land. The cases of Sjoli v. Dreschel, 199 U. S. 564, and Osborn v. Froyseth, 216 U. S., 571, are relied upon in support of the claim. The same claim was made and the same cases cited by the defendant to this court on the former appeal in the instant case, but it was held, evidently in view of later decisions of the federal supreme court, that the defendant could not prevail upon the strength of his settlement upon the land unaccompanied with efforts to acquire title under the homestead laws. The controlling facts in this case are that, while the defendant entered into possession of the land in 1888, his first tender of a homestead application was more than twelve years after a valid selection of the land had been made on October 29, 1891, and approved as of that date under the doctrine of relation, and that the defendant was guilty of laches as was held on his appeal to the Secretary of the Interior.

Weyerhauser v. Hoyt, 219 U. S. 380;
Northern Pacific Ry. Co., v. Mass., 219 U. S., 426.

We accordingly hold that the facts found by the trial court support its conclusion of law and the judgment in favor of the plaintiff.

Judgment affirmed.

START, *C. J.*

44 17576. State of Minnesota, Supreme Court. Catherine M. Morris, Respondent, vs. R. K. Svor, Appellant. Opinion and Syllabus. Filed June 28, 1912. I. A. Caswell, Clerk. Start C. J.

45 State of Minnesota Supreme Court, General April Term, A. D. 1912.

FRIDAY MORNING, 9:30 O'CLOCK, *June 7; A. D.* 1912.

Court convened pursuant to adjournment. All the Justices being present.

Reg. No. 17576. Cal. No. 132.

CATHERINE M. MORRIS, Respondent,
VS.
R. K. SVOR, Appellant.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel, submitted to the court for decision and taken under advisement.

A true record
Attest:

I. A. CASWELL, *Clerk.*

The foregoing is a full and true copy of the Minutes of Argument in the above entitled cause.

Attest:

[Seal of the Supreme Court of the State of Minnesota.]

I. A. CASWELL, *Clerk.*

By ——— ———, *Deputy.*

46 17576. State of Minnesota Supreme Court. Copy of Minutes of Argument. Filed July 9 1912. I. A. Caswell, Clerk.

47 State of Minnesota Supreme Court, April Term, A. D. 1912.

No. 132.

CATHERINE M. MORRIS, Respondent,

vs.

R. K. SVOR, Appellant.

Appeal from District Court, Twelfth Judicial District, County of Chippewa.

This cause having been duly argued and submitted at the General April Term of this court A. D. 1912 upon the return to the appeal herein.

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the Court below, herein appealed from, be and the same hereby is, in all things affirmed and that judgment be entered accordingly.

Entered July 9 A. D. 1912.

By the Court,

Attest:

I. A. CASWELL, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original Order for judgment entered in the above entitled cause.

Attest:

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL, *Clerk.*

48 No. 17576. State of Minnesota Supreme Court. Copy of Order for Judgment. Filed July 9 1912. I. A. Caswell, Clerk.

49 State of Minnesota Supreme Court, April Term, A. D. 1912.

No. 132.

CATHERINE M. MORRIS, Respondent,
vs.
R. K. SVOR, Appellant.

Pursuant to an order of Court duly made and entered in this cause July 9, A. D. 1912.

It is here and hereby determined and adjudged that the judgment of the Court below, herein appealed from, to wit, of the District Court of the Twelfth Judicial District, sitting within and for the County of Chippewa be and the same hereby is in things affirmed. And it is further determined and adjudged that the Respondent above named, do have and recover of said Appellant herein the sum and amount of Thirty-seven and 50/100 dollars, ($37.50) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed July 9, A. D. 1912.

By the court.

Attest:

I. A. CASWELL, *Clerk.*

Statement for Judgment.

Cost allowed by statute	$25.00
Printer's fees	2.50
Clerk's fees, Supreme Court	10.00
Affidavits and Acknowledgements	....
Return	....
Postage and express	....
Filing Mandate	....
	$37.50

50 State of Minnesota Supreme Court. Transcript of Judgment. Filed July 9, 1912. I. A. Caswell, Clerk.

STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, Clerk of said Supreme Court do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the city of St. Paul July 9 A. D. 1912.

[SEAL.] I. A. CASWELL, *Clerk.*

51 17576. State of Minnesota Supreme Court. Catherine M. Morris, Respondent, vs. R. K. Svor, Appellant. Judgment Roll. Filed July 9, 1912. I. A. Caswell, Clerk.

52 *Authentication of Record.*

SUPREME COURT,
State of Minnesota, ss:

I, I. A. Caswell, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of Catherine M. Morris, Respondent, vs. R. K. Svor, Appellant, and also the opinion of the court rendered therein, together with the assignment of errors to this court and the judgment roll, as the same now appear on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office, in St. Paul, Minnesota, this 23d day of July, 1912.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court, Minnesota.

53 STATE OF MINNESOTA:

In the Supreme Court.

CATHERINE M. MORRIS, Respondent,
vs.
RASMUS K. SVOR, Appellant.

The said Rasmus K. Svor assigns the following errors in the records and proceedings of said cause:

1. The Court erred in rendering the judgment affirming herein the Judgment rendered by the District Court of the Twelfth Judicial District of the State of Minnesota, in favor of the Plaintiff, and adjudging that said Respondent recover of Appellant the costs and disbursements, whereas the Judgment of said District Court should have been reversed.

2. The Court erred in holding that Russell Sage, as Trustee of the Hastings & Dakota Railway Company, could, on October 29, *1911*, in behalf of said Railway Company, select any land for the reason that more than three years had elapsed since the franchise and corporate existence had been forfeited by the Supreme Court of the State of Minnesota on March 23, 1887.

3. The Court erred in holding that the tract of land in controversy could, on October 29, 1891, when actually occupied by the plaintiff in error, a qualified homesteader with his family, and claiming it as a homestead, be selected by the Railway Company as indemnity land.

4. The Court erred in holding that the application of the defend-

ant on December 17, 1885, and his settlement on the land in 1888, and his continual residence thereon since that time, did not have the effect of withdrawing the land from any attempted selec-
54 tion by the Railway Company as indemnity land.

5. The Court erred in holding that the plaintiff could maintain this action, even though the land had not been occupied by her, or her predecessors, within fifteen years next before the commencement of the action.

6. The Court erred in holding that the respondent is the owner of the land described in the complaint, and ordering judgment accordingly.

7. The Court erred in holding that the rights of the defendant were not superior to those of the plaintiff, for which Errors the defendant Rasmus K. Svor, prays that the said judgment of the Supreme Court of the State of Minnesota, dated July 9, 1911, be reversed, and a judgment rendered in favor of the defendant, and for costs.

C. A. FOSNES,
Attorney for Rasmus K. Svor.

[Endorsed:] Filed Jul- 13, 1912. I. A. Caswell, clerk. July 13.

55 State of Minnesota Supreme Court.

CATHERINE M. MORRIS, Respondent,
vs.
RASMUS K. SVOR, Appellant.

Petition for Writ of Error.

To the Honorable Charles M. Start, Chief Justice of the Supreme Court of the State of Minnesota:

The petition of Rasmus K. Svor, the above named appellant, respectfully represents that on or about the 9th day of July, 1912, there was entered in and by the Supreme Court of the State of Minnesota, the same being the highest court of the state, a final judgment in a certain action therein pending between the said Rasmus K. Svor, appellant in the Supreme Court of Minnesota, (defendant in the District Court of Chippewa County, Minnesota the court of original jurisdiction in said action) and Catherine M. Morris, respondent in said Supreme Court (and defendant in said district court), said judgment being in favor of said respondent and in affirmance of the judgment previously rendered by the said District Court in her favor. That in said judgment of said Supreme Court, and in the proceedings had prior thereto in said cause, certain errors were committed to the prejudice of this petitioner all of which will more fully appear from the assignment of errors herewith submitted and filed, and from the certified transcript of the record in said cause herewith submitted. That in said cause a title and right was and is claimed by your petitioner under the Statute of the United States and by virtue of the commission held and authority exercised under

the United States, and the decision and judgment in said cause is against the said title and the right specifically set up and claimed by your petitioner under said Statute, commission and authority.

Therefore the petitioner, considering himself aggrieved by the said final decision of the Supreme Court of the State of Minnesota, in rendering judgment against him in the above entitled action, hereby prays that a writ of error may be issued in this behalf to the said Supreme Court of the State of Minnesota for the correction of
56 the errors so complained of, from the decision *the errors so complained of, from the decision* and judgment aforesaid, and that a transcript of the record proceedings and papers in this cause duly authenticated, may be sent to the Supreme Court of the United States.

Dated July 11, 1912.

C. A. FOSNES,
Attorney for Petitioner.

SUPREME COURT,
State of Minnesota:

On reading the foregoing petition for writ of error, the assignment of errors and the transcript of record herewith submitted it is ordered that a writ of error issue upon the execution of a bond by the petitioner to Catherine M. Morris, in the sum of two thousand dollars; such bond when approved to act as a supersedeas.

Dated July 12th, 1912.

CHAS. M. START,
Chief Justice Supreme Court of Minnesota.

[Endorsed:] Filed Jul- 13, 1912. I. A. Caswell, clerk. July 13.

57 State of Minnesota Supreme Court.

CATHERINE M. MORRIS, Respondent,
vs.
RASMUS K. SVOR, Appellant.

Know all men by these presents That we Rasmus K. Svor as principal and Gustav Laumb and Thorvald Laumb as sureties are held and firmly bound unto Catherine M. Morris in the sum of Two Thousand ($2000) Dollars, lawful money of the United States, to be *a*pid unto the said Catherine M. Morris her heirs, executors, administrators or assigns, for which payment, well and truely to be made, we jointly and severally bind ourselves, our heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated this 17th day of July, A. D. 1912.

The condition of this obligation is such that, Whereas, the above named Rasmus K. Svor seeks to prosecute his writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by Supreme Court of the State of Minnesota.

Now, therefore, The condition of this obligation is such, that if the above named Rasmus K. Svor shall prosecute his said writ of error to effect, and answer all the costs and damages that may be adjudged if he should fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and effect.

In testimony whereof, We have hereunto set our hands and seals on this 17th day of July A. D. 1912.

RASMUS K. SVOR. [SEAL.]
GUSTAV LAUMB. [SEAL.]
THORVALD LAUMB. [SEAL.]

Signed, Sealed and Delivered in Presence of
C. A. FOSNES.
ALFRED K. FOSNES.

58 STATE OF MINNESOTA,
County of Chippewa, ss:

Be it known, T-at on this 17th day of July A. D. 1912, came before me personally Rasmus K. Svor, Gustav Laumb and Thorvald Laumb to me well known to be the same persons who executed the foregoing bond, and each severally acknowledged the same to be his own free act and deed.

C. A. FOSNES,
Notary Public, Chippewa County, Minn.

My commission expires Jan. 11, 1915.

STATE OF MINNESOTA,
County of Chippewa, ss:

Gustav Laumb and Thorvald Laumb came personally before me, and being duly sworn, each for himself doth depose and say that he is the surety above named, and a resident and freeholder of the State of Minnesota, and worth the sum of Two Thousand ($2000) Dollars over and above his debts and liabilities, and exclusive of his property exempt from execution.

GUSTAV LAUMB.
THORVALD LAUMB.

Subscribed and sworn to before me this 17th day of July, 1912.

C. A. FOSNES,
Notary Public, Chippewa County, Minn.

My Commission expires Jan. 11, 1912.

59 State of Minnesota, Supreme Court. Bond in Appeal. Catherine M. Morris, Respondent, vs. Rasmus K. Svor, Appellant.

I hereby approve of the within bond and the sureties thereon, the same to operate as a supersedeas.

Dated July 18, 1912.

CHAS. M. START,
Chief Justice Supreme Court of Minnesota.

Filed July 18 1912. I. A. Caswell, Clerk.

60 STATE OF MINNESOTA:

In the Supreme Court.

CATHERINE M. MORRIS, Respondent,
vs.
RASMUS K. SVOR, Appellant.

UNITED STATES OF AMERICA:

The President of the United States to the Honorable the Justices of the Supreme Court of the State of Minnesota, Greeting:

Because of the record and proceedings, and also in the rendition of the Judgment of a Plea, which in the said Supreme Court of the State of Minnesota before you, or some of you, being the highest court of the said State in which decision could be had in the suit between Catherine M. Morris, plaintiff, and Rasmus K. Svor, defendant, wherein was drawn into question and involved the validity of a patent and statute or commission held and authority exercised under the United States, and the decision was against a title and right set up and claimed by the said Rasmus K. Svor under the said statute and authority, a manifest error hath happened to the great damage of the said Rasmus K. Svor, as by his answer appears. We being willing that Error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf do Command you, if judgment be herein given that *they* then under your seal distinctly and openly, you send the same to the Supreme Court of the United States, together with this Writ, so that you have the same at Washington on the 16 day of August, 1912, in the said Supreme Court to be then and there held, that the records and proceedings aforesaid being inspected, the said supreme court may cause further to be done therein to correct that Error what of right, and according to laws and customs of the United States should
61 be done.

Witness the Honorable Edward D. White, Chief Justice of said Supreme Court, on the 18th day of July in the year of our Lord one thousand nine hundred and twelve.

[U. S. Dist. Court Seal, District of Minnesota, Third Division.]

CHARLES L. SPENCER,
Clerk of the United States District Court
for the District of Minnesota.

[Endorsed:] Due service of the within admitted this 18th day of July A. D. 1912. Owen. Morris, Attorney for Respondent. Filed Jul- 18 1912. I. A. Caswell, Clerk.

62 *Certificate of Lodgment.*

STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, clerk of the said court, do hereby certify that there was lodged with me as such clerk on the 18th day of July, 1912, in the matter of Catherine M. Morris, Respondent, vs. Rasmus K. Svor, Appellant,

1. The original bond of which a copy is herein set forth.
2. Copies of the writ of error, as herein set forth.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in St. Paul, Minnesota, this 23rd day of July, 1912.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

63 STATE OF MINNESOTA:

In the Supreme Court.

CATHERINE M. MORRIS, Respondent,
vs.
RASMUS K. SVOR, Appellant.

Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to Catherine M. Morris, Greeting:

You are hereby Cited and Admonished to be and appear at a session of the Supreme Court of the United States, to be holden at the city of Washington, on the 16 day of August, 1912, pursuant to a Writ of Error filed in the Clerk's office in the Supreme Court of the State of Minnesota, wherein Rasmus K. Svor is Plaintiff in Error, and you are the defendant in Error, to show cause, if any there be, why the Judgment rendered against the plaintiff in error as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 18th day of July, in the year of our Lord one thousand nine hundred and twelve.

CHAS. M. START,
Chief Justice of the Supreme Court of the State of Minnesota.

[Endorsed:] Filed Jul- 18 1912. I. A. Caswell, Clerk. Due service admitted of the within this 18th day of July A. D. 1912. Owen Morris, Attorney for Respondent.

64 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Minnesota, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of the said Supreme Court of Minnesota, in the city of St. Paul, this 23d day of July, 1912.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

Endorsed on cover: File No. 23,331. Minnesota Supreme Court. Term No. 756. Rasmus K. Svor, plaintiff in error, vs. Catherine M. Morris. Filed August 12th, 1912. File No. 23,331.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912

No. 756.

RASMUS K. SVOR, Plaintiff in Error.

vs.

CATHERINE M. MORRIS, Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This is an action of ejectment brought by the defendant in error who claims title to the land in controversy under the Hastings & Dakota Railway Company's Land Grant, derived through Russell Sage as assignee in trust of such Railway Company.

The land involved is the Southwest Quarter of Section 11, Township 119, Range 40, in Chippewa

County, Minnesota, falling within the INDEMNITY limits of the company's grant. The case was tried by the court.

According to the pleadings, and the findings of the trial court, the material facts are:

Congress of the United States by an Act approved on the 4th day of July, 1866, granted to the State of Minnesota for the purpose of aiding in the construction of a railroad from Hastings to the western boundary of the state, every alternate section of land designated by odd numbers to the amount of five alternate sections per mile on each side of said road, and not sold, reserved or otherwise appropriated, or to which the right of homestead or pre-emption had not attached within twenty miles of said road, which land should be subject to the disposal of the legislature of the State of Minnesota for said purposes; all as alleged and more particularly set forth in paragraph two of the complaint.

The legislature of the State of Minnesota by an act passed and approved for that purpose in March, 1867, accepted the grant and granted all the lands to the Hastings, Minnesota River and Red River of the North Railway Company, which was then an existing corporation with the power to construct the road above mentioned and to receive the grant which it accepted, and said corporation subsequently became known, by change of name, as the Hastings and Dakota Railway Co. The company surveyed and definitely located its line of road and caused a map there-

of to be transmitted to the Governor of Minnesota and to the Secretary of the Interior, which map was duly approved and the land grant has been administered with reference to the map of definite location. The entire line of said road was finally constructed and completed in the year 1880, and the completion of the road was duly accepted and its completion duly certified to the Secretary of the Interior prior to January 1st, 1881.

The land involved in this action, the southwest quarter of Section 11, Township 119, Range 40, Chippewa County, Minnesota, is not within the place limits of the grant, but is included within the indemnity limits of the line of railroad as located and constructed to completion, and the land was withdrawn by the proper authority from settlement for the benefit of said grant on July 12, 1866, and also by modified order of April 22nd, 1868. On the 26th day of May, 1883, there existed a deficiency in the place limits of the grant and because thereof the Hastings & Dakota Railway Company for whose benefit the grant was made, attempted to select the land in question, together with other lands within the indemnity limits of the grant, but the selection was rejected.

By a judgment of the State Supreme Court, of the State of Minnesota, given and entered March 23rd, 1887, the charter and franchises of the Hastings & Dakota Railway Company was adjudged forfeited, and the corporation dissolved, subject, however, to the statutory period of three years allowed the

company to wind up its affairs, and by its deeds of trust of date December 9th, 1889, the company conveyed and assigned to Russell Sage all its property and all its rights and interests in the land in question, and all lands embraced within the land grant in trust for the benefit of all the stockholders of the company, the deed in terms granting and giving to him the right to maintain and prosecute all actions necessary to carry out the purpose of the trust and assignment, which trust was accepted by him, and he continued to act as such trustee until his death, which occured in July. 1906. No receiver of the company was, however, at any time appointed.

On May 28th, 1891, pursuant to instructions from the Secretary of the Interior, the Commissioner of the General Land Office directed the officers of the proper local land office that, after giving notice, they should restore to the public domain and open to settlement all the lands in the indemnity limits, of said grant, "Not embracing selections heretofore made and applied for by said company." The selection of May 26, 1883, of the land in question which selection is mentioned in findings No. 5, were pending on appeal until Oct. 23, 1891.

After the rejection of the attempted selection made by the Hastings & Dakota Railway Company in 1883, of the land here in question as well as other lands, Russell Sage, acting ostensibly under and by virtue of the powers vested in him, by the said deed of trust, and not otherwise, assumed to make another

selection on the 29th day of October, 1891, of the land in suit, together with other lands within the indemnity limits of said grant, claiming and alleging that all thereof was then vacant and unappropriated, which selection was in form and in compliance with the rules of the Land Department, and which selection was certified, and was approved by the Secretary of the Interior on March 29th, 1897, and whatever title was acquired by said selection under said land grant to the land in question, was acquired by and vested in the said Russell Sage as assignee in trust of the Hastings & Dakota Railway Company. And the said Sage never acquired any other right to any of the land herein mentioned other than by virtue of said selection.

This action was commenced by the service of the summons and complaint herein upon the defendant on October 23rd, 1897; that subsequent to the year 1902 and prior to the death of Sage in 1906, the present plaintiff acquired and there was vested in her and she is now the owner of whatever right, interest and title said Sage as assignee in trust, had or at any time held in and to the premises in question, but whatever right she thus acquired in or to said premises was acquired with full, ample and sufficient notice and knowledge of the defendant's claim of right to hold the land under the homestead laws, and that he asserted a right to the title and ownership thereof, as against said Sage and all persons claiming under him, or under the land grant.

In the year 1883 the defendant duly declared his intention to become a citizen of the United States, and was after that date in all respects qualified and entitled to make homestead entry under the laws of the United States, and on the 17th day of December, 1885, the defendant under the name of Rasmus K. Svor, which is his true name, offered at the proper land office a homestead entry in due form for the land in dispute and tendered the requisite fees, but all of which was refused by the proper officers of the local land office because the tract applied for was within the indemnity limits of the St. Paul and Pacific as well as within the indemnity limits of the Hastings & Dakota Railway Company's land grants, and had been withdrawn from settlement, and because of an attempted selection made by the Hastings & Dakota Railway Company which was then pending on appeal, and because the defendant did not show settlement and residence on the land prior to the said selection, from which decision the defendant did not appeal.

On June 11th, 1887, the defendant was duly admitted to citizenship and he became a duly naturalized citizen of the United States and has ever since remained so. After the decision of the land office referred to, and in the early part of the year 1888 the defendant entered and settled upon the land in question and erected thereon a dwelling house and broke up fifteen acres of the land, and from thence until now he has continued to reside on said land and has

made his home there. And from year to year he continued to improve the premises so that in September, 1898, when this action was first tried, there was upon the premises a dwelling house, a substantial granary, a machine shed, two stables, all exceeding in value $2000, a grove, and one hundred and fifteen acres of land was under cultivation, and practically all of which improvements were upon the land at the time of the commencement of this action.

His residence and improvements were at all times sufficient to comply with the requirements of the homestead laws of the United States.

The defendant, on January 15th, 1904, again tendered his homestead application to the proper office for said tract, which application was rejected by the local officers on the ground that a selection of the tract had been approved to the Hastings & Dakota Railway Company. From this action of the local officers the defendant appealed to the Commissioner of the General land office, who affirmed the decision of the local office, and the defendant thereupon appealed to the Secretary of the Interior, who, on October 17th, 1905. affirmed the decision, substantially on the ground that the defendant was guilty of laches, and denied him a hearing in proof of his allegations of settlement and residence on the land.

At the time of the selection made by Sage, in 1891, which was approved in 1897, the land in question was not vacant, but was then occupied by the defendant, who has continually occupied and resided

upon the land with his family since 1888, and he does still so reside upon and occupy the same, and he entered upon and went into possession of the land with intent to enter upon and claim the same as a homestead, and with a view of making the same his home, and he has consistently and persistently claimed the right to hold and occupy the same as a homestead and has constantly improved the same, and at all times he has asserted a right thereto. The defendant has never occupied any other land as owner, and does not own, nor has he any title to any other land.

ASSIGNMENT OF ERRORS.

The assignment of errors accompanied the writ of error, appear in the record (fol. 53-55) and are as follows:

1. The Court erred in rendering the judgment affirming herein the judgment rendered by the District Court of the Twelfth Judicial District of the State of Minnesota, in favor of the Plaintiff, and adjudging that said Respondent recover of Appellant the costs and disbursements, whereas the judgment of said District Court should have been reversed.

2. The Court erred in holding that Russell Sage, as Trustee of the Hastings & Dakota Railway Company, could, on October 29th, 1911, in behalf of said Railway Company, select any land for the reason that more than three years had elapsed, and franchise and corporate existence had been forfeited by the

Supreme Court of the State of Minnesota on March 23, 1887.

3. The Court erred in holding that the tract of land in controversy could, on October 29, 1891, when actually occupied by the plaintiff in error, a qualified homesteader with his family, and claiming it as a homestead, be selected by the Railroad Company as indemnity land.

4. The Court erred in holding that the application of the defendant on December 17, 1885, and his settlement on the land in 1888, and his continual residence thereon since that time, did not have the effect of withdrawing the land for any attempted selection by the Railway Company as indemnity land.

5. The Court erred in holding that the plaintiff could maintain this action, even though the same had not been occupied by her or her predecessors within fifteen years next before the commencement of this action.

6. The Court erred in holding that the respondent is the owner of the land described in the complaint, and ordering judgment accordingly.

7. The Court erred in holding that the rights of the defendant were not superior to those of the plaintiff, for which errors the defendant, Rasmus K. Svor, prays that the said judgment of the Supreme Court of the State of Minnesota, dated July 9, 1911, be reversed, and a judgment rendered in favor of the defendant, and for costs.

ARGUMENT.

The plaintiff in error claims:

1. That the Hastings & Dakota Railway Company acquired no rights under the selection of 1883.

2. The land being within the indemnity limits of the grant the company acquired no rights until the deficiency in the place lands were ascertained, a selection made and APPROVED by the SECRETARY OF INTERIOR.

3. The lands having been restored to the public domain on October 23rd, 1891, his rights as a homesteader attached at that time.

4. That at the time of the attempted selection of Sage on October 29th, 1891, his rights as a qualified homesteader had attached by reason of his settlement and improvement and that such settlement prevented a selection by the company or its representatives.

5. The railway company having ceased to exist on March 23, 1890, three years after the entry of the forfeiture judgment, had no right through its trustee or otherwise, to select any lands.

6. Defendant in error having had no possession within 15 years next before the commencement of the action, could not maintain ejectment.

The question naturally arises, what right, if any, is acquired in indemnity land without an approval of the selection?

In some of the grants that have been made to

states, it is provided that the SELECTION of the indemnity lands shall be made by an agent of the state, and in others that the selection shall be made by the company, but in all cases subject, in some manner, to the approval of the Secretary of the Interior. Other grants provide that the selection of indemnity lands shall be made "under the direction" of the Secretary, while in this the language used is that the Secretary "shall cause to be selected" the indemnity land. The one controlling feature in all the grants is that the selection of indemnity land must be made with acquiescence and approval of the Secretary. Whatever form of words has been used, the essence is the same, and all these grants, in this respect, have been construed alike by the land department and the courts without any hair-splitting distinctions, and without speculating on the different shades of meaning which could be ascribed to the language used.

In Wis. C. Ry. Co. v. Price, 133 U. S., 496, the Court says:

> "Numerous grants of land were made by Congress between 1860 and 1880 to aid in the construction of railroads; some directly to incorporated companies, others to different states, the lands to be by them transferred to companies, by whom the construction of the road might be undertaken. The different acts making these grants WERE SIMILAR IN THEIR GENERAL PROVISIONS, and so many of them have been at different times

before this court for consideration, that little can be said of their purport and meaning, the title they transfer, and the conditions upon which the lands could be used and disposed of, which has not already and repeatedly been said in its decisions. Each grant gave a specific quantity of lands, designated by sections along the route of the proposed road, with the exception of such as might, when the line of road should be definitely fixed, have been disposed of or reserved by the government, or to which a pre-emption or homestead right might then have been attached. For these excepted sections—which otherwise would have been taken from those designated along the line of the roads, other lands beyond those sections, within a specified distance, were allowed to be selected (as indemnity.)"

Again, in Barney v. Winona & St. P. Ry. Co., 117 U. S., 228, the court says:

"In the construction of land grant acts in aid of railroads, there is a well established distinction observed between 'granted lands' and 'indemnity lands.' The former are those falling within limits specially designated, and the title to which attaches when the lands are located by an approved and accepted survey of the line of the road filed in the land department, as of the date of the act of

congress. The latter are those lands selected in lieu of parcels lost by previous disposition or reservation for other purposes, and the title to which accrues only from the time of their selection."

This grant, like all others of its kind, contained "granted lands" and "indemnity lands." The title to the granted lands attached when the line of road was definitely located by the filing of a proper map in the land office, subject to the condition subsequent that the road must be constructed—but the title to the indemnity lands would not accrue until there was a SELECTION and an APPROVAL thereof. There is no one designated in this act to make the selection, and it would therefore have to be made by the party interested in getting the lands. No other selection is claimed, except that made by the company.

The language is not peculiar to this grant; it is the identical language used in the grant of March 3, 1863, to the State of Kansas, which was construed in Kan. P. R. Co. v. Atchison, T. & S. R. Co., 112 U. S., 414.

It is also identical with the language used in the grant (13 Stats., 84, construed by the court in S. C. & St. P. R. Co. v. C. M. & St. P. Ry. Co., 117 U. S., 406; and with the language of the grant considered in U. S. vs. Missouri, K. & T. Co., 141 U. S., 358.

These are three of the most conspicuous cases in which it was held that before any rights could be

acquired in indemnity land under such a grant, a SELECTION must be made by the company, which, in order to be efficacious, MUST BE APPROVED by the Secretary.

The same was held as to a grant where it was provided that the land to be taken by the company as indemnity should be "indicated" by the Secretary. The court held that the word INDICATED, while peculiar, meant no more than that the selections were to be approved by him.

ST. P. & S. C. Ry. Co. v. W. &
ST. P. Ry. Co., 112 U. S. 720.

The same rule has been applied to grants where the act required the indemnity lands to be selected "under the direction" of the Secretary of the Interior.

Railway Company v. Bell, 183 U. S., 675.

It is clear, therefore, that there is nothing about this grant which requires the application to it of any different rules from those which apply to all grants of its kind.

It is clear, without argument, that the act of the Land Department in simply withdrawing the land from settlement, within an indemnity grant, whether, by direction of the granting act or not, creates no RIGHT in the land. It is simply a step by which the land affected is withheld from the public for a sufficient time to give the company for whose benefit it is contingently granted, an opportunity to make its selections.

This grant directed the land to be withdrawn,

and it was accordingly done.

But no proposition is better established than that the Secretary of the Interior has the power, VIRTUTE OFFICII, to make withdrawals of the public lands, and the power to MAKE carries with it the power to revoke withdrawals at his will, when no statute is in the way.

Wolsey v. Chapman, 101 U. S., 755.

O'Connor v. Gjertgens, 85 Minn., 483.

The exercise of this power is discretionary, where the grant is silent on the subject. In this instance congress expressly directed the withdrawal to be made, and converted the discretionary power into a positive duty. In like manner, by the act of Sept. 29th, 1890, when congress desired to invest the Secretary with the discretionary power to revoke the withdrawal at his will, it repealed the section which had required him to make it. By neither act did congress enlarge or diminish the general powers theretofore possessed by the Secretary.

Speaking of rights under withdrawals, and the abuses arising from unnecessarily prolonging them in Railway Company v. Railway Company, 112 U. S., 720, this Court said:

> "It is true that in some cases the statute requires the Land Department to withdraw the lands within these secondary limits from the market, and in some others the officers do so voluntarily. This, however, is to give the company a reasonable time to ascertain

its deficiencies and make its selections; it by no means implies a vested right in the company."

The Court further said in that case:

"The court of original jurisdiction finds that up to the time of the trial in October, 1878, a period of nearly twenty years, no selection of these lands had ever been made by the company or any one for it. Was there a VESTED RIGHT in this company during all this time, to have, not only these lands, but all the other odd sections within the twenty-mile limits on each side of the line of road, await its pleasure? Had the settlers in that populous region no right to buy of the government because the company might choose to take them, or might after all this delay, find out that they were unnecessary to make up deficiencies in other quarters? How long were such lands to be withheld from market and withdrawn from taxation and forbidden to cultivation?"

In Ry. Co. v. Bell, 183 U. S., 675 the Court said:

"In view of the constant trend of population toward the western territories it is a serious matter to withdraw these enormous tracts from settlement and hold them as it were in mortmain, against the protest of those who stand ready to enter upon and

possess them. It becomes still more serious when, as in this case there was a delay of twenty seven years between the granting act and the act of selection. It seems intolerable that a settler, who had entered and paid for lands in good faith, should be liable to an custer after a possible lapse of twenty-seven years, when the very improvements he may have put upon the land might be the reason for their selection by the company."

After the repeal of the section of the law requring this withdrawal to be made, and after 23 YEARS had been allowed the company in which to make its selections the secretary on May 22, 1891, directed its revocation. The Secretary in his letter calls attention to the fact that the obstacle in the way of the REVOCATION of this as well as a similar withdrawal in relation to the Manitoba grant, had now been removed by the repeal of the sections of the laws requiring them to be made.

Under those circumstances no doubt can be entertained of either the right or propriety of the repeal by congress of that part of the act directing the withdrawal to be made, and the CONSEQUENT revocation of the withdrawal by the land department.

It cannot be argued with any seriousness or reason that the revocation of the withdrawal and the restoration of the land to the public domain was not complete on October 23rd, 1891, when the selection of

the railway company which had been attempted, or "applied for" were cancelled and wiped out.

There is not a question that is, or can be, raised in this action that was not decided in

Osborne vs. Froyseth, 216 U. S. 571
(54 L. E. 619)

and shall content myself as far as the law is concerned with calling attention to that case in addition to those hereinbefore referred to.

The question of the sufficiency of the 1883 selection was raised there, as here, and in disposing of that the court there said:

> "But it is urged that the original selection made May 26th, 1883, was valid and operated to vest the title as of that date in the railway company. There is nothing peculiar in the act of July 4, 1886, which protected indemnity lands against settlement upon the filing of a map showing definite location of the railroad. The grant was one of every alternate section of land, designated by odd numbers, to the amount of five alternate sections per mile on each side of the road. Then follows the indemnity provision in these words: "But in case it shall appear that the United States have, when the lines or route of said roads are definitely located, sold any section, or part thereof, granted as aforesaid, or that the right of preemption or homestead settlement has at-

tached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purpose aforesaid, from the public lands of the United States, nearest to the tiers of sections above specified, so much land in alternate sections or parts of sections designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or preemption has attached as aforesaid, which lands thus indicated by odd numbers and sections, by the direction of the Secretary of the Interior, shall be held by, etc." The rejection by the Secretary of the Interior of the selection made in 1883 is fatal to any claim now made to carry back the title of the plaintiffs in error to that selection. The right to any land within the indemnity limits of the grant, as has been often decided, depended upon the inquiry whether deficiencies had been established within the place limits, and also whether the lands selected in place of such lost lands were, at the time, subject to such appropriation. Thus, if either preemption or homestead rights had been initiated before such selection, the parcels to which such

rights had attached were not subject to appropriation as indemnity lands."

It was there decided that NO right CAN BE ACQUIRED IN INDEMNITY LANDS, in a grant like this until there is a valid SELECTION which is APPROVED BY THE SECRETARY OF THE INTERIOR, REGARDLESS OF THE DEFICIT OF THE PLACE LIMITS.

"Until the selections were approved, there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then the lands which might be taken as indemnity were incapable of indentification; the proposed selection remained the property of the United States. The government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts. That doctrine, until selection made, no title vests in any indemnity lands, has been recognized in several descisions of this court. Thus in Ryan v. Central P. R. Co., 99 U. S., 382-386, 25 L., ed. 305, in considering a grant of land by Congress, in aid of the construction of a railroad similar in its general features to the one in this case the Court said: "Under this statute, when

the road was located and the maps were made, the right of the company to the odd sections first named became ipse facto fixed and absolute. With respect to the 'lieu lands,' as they are called, the right was only a float, and attached to no specific tracts until the selection was actually made in the manner prescribed.' And again, speaking of a deficiency in the land granted, it said: 'It was within the secondary or indemnity territory where the deficiency was to be supplied. The railway company was not and could not have any claim to it until specially selected, as it was for that purpose.' In Sjoli v. Dreschel, 199 U. S., 564-566, 50 L., ed. 311-312, 26 Sup. Ct., Rep. 154-155, this Court said: 'That, up to the time such approval is given, lands within indemnity limits, altho embraced by the company's list of selections, are subject to be disposed of by the United States, or to be settled upon and occupied under the pre-emption and homestead laws of the United States.'"

It was also decided

"That even if there was no record evidence of the homestead claim when the selection of 1891 was made, it was not enough to give efficacy to that selection and vest the legal title under the patents thereafter issued.

In that case it was also said that "IF AT THAT

DATE THIS LAND WAS ACTUALLY OCCUPIED BY ONE QUALIFIED UNDER THE LAW, WHO HAD ENTERED AND SETTLED THEREON BEFORE THAT TIME, WITH THE INTENT TO CLAIM IT AS A HOMESTEAD THE LAND HAD CEASED TO BE PUBLIC LAND, AND AS SUCH SUBJECT TO SELECTION AS LIEU LAND."

The facts peculiar to plaintiff in error and in so far as they are material to this controversy are as follows:

In the year 1883, he declared his intention to become a citizen of the United States, (Rec. fol. 27-28), he in 1887 became a full citizen (Rec. 28). After 1883, he was, in all respects, qualified to make a homestead entry under the laws of the United States. (Rec. 27-28). That on December 17, 1885, under the name of Rasmus K. Svor, offered at the proper Land Office a homestead entry in due form for the land in dispute, the fees tendered (Rec. 27-28) but the application was refused by the local land office because the tract of land applied for was within the indemnity limits of the St. Paul and Pacific, as well as within the indemnity limits of the Hastings & Dakota Railway land grant, and had been withdrawn from settlement.

He settled on the land in 1888 and has lived there ever since; he erected a dwelling house thereon, broke portions of the land, built a substantial granary, machine shed and two stables; that he has lived upon the land since 1888 with intention of ac-

quiring it and claiming it under homestead laws of the United States, and that his residence and improvements were at all times sufficient to comply with the homestead laws. (Rec. 28.) All of these acts were performed prior to the approval of the selection made by the Hastings & Dakota Railway Co. in 1897, (Rec. 26.) In July, 1904, he again made application for homestead entry on this land; which was again refused (Fol. 108-109, 324.)

I shall discuss one other question, the only legal question, as it appears to me, still open in cases under the Hastings & Dakota Railway grant, and that is as to whether the trustee had authority to make the selection in 1891 or any other time after three years from the date of entry of the forfeiture judgment hereinafter referred to.

The railway company, having ceased to exist on March 23, 1890, three years after the entry of the forfeiture judgment, had no right, through its trustees or otherwise, to select any lands. This point is so important, in these cases, and to us so evident, that we wish to urge it now most sincerely and earnestly.

In the decision found in 36 Minn., 246, the charter of the Hastings & Dakota Railway Company was forfeited March 23, 1887. (Rec. 25.)

Under the principle of the common law the effect of the dissolution of the corporation is to put an end to its existence for all purposes, and to destroy every one of its faculties so that thereafter it cannot make

contracts, nor sue or be sued; all debts to it, or from it, become extinguished, and all actions by or against it abate.

Sec. 6718, Thompson on Corporations,
44 Minn., 460.

Statutes have been passed continuing the existence of corporations for certain purposes and for certain length of time. In our State for three years for the purpose of winding up affairs. At the end of that time the condition of things would be precisely the same as it would have been if the corporation had at that time been dissolved without such a statute being in existence."

Sec. 6734, Thompson on Corporations.

"During the period in which the existence of the corporation thus extended, no power can be exercised by it, or in its name, except such as may be necessary for the winding up of its affairs."

Sec. 6736, Thompson on Corporations.
Mariner's Bank vs. Sewall, 50 Me. 220.

"If the charter of the corporation is repealed by the valid act of the Legislature, it's dissolution takes effect at the time when the repealing act takes effect and is not postponed by statute continuing the corporate faculties for three years for the purpose of winding up its affairs. The company conveyed to Russell Sage, as trustee, the land

which it then owned and in addition assumed to transfer to him its interests in the land grant. This transfer was not for the benefit of creditors, but for the exclusive benefit of STOCKHOLDERS of the Company."

We maintain that this is not one of the purposes for which the company had its existence continued under Sec. 3431, Gen. St. of 1894, and that Mr. Sage had no right to make any selection of any indemnity land.

The statute just referred to reads as follows:

Corporations whose charters expire by their own limitation, or are annulled by forfeiture or otherwise, shall, nevertheless, continue bodies corporate for the term of three years after the time when they would have been so dissolved, for the purpose of prosecuting and defending actions by or against them, and of enabling them gradually to settle and close their concerns, to dispose of and convey their property, and to divide their capital stock; but not for the purpose of continuing the business for which they were established.

"When a corporation is dissolved it ceases to be a corporation for the purpose of continuing the business for which it was established. It retains only power to gradually settle and close its concerns and upon the appointment of a receiver that power is placed in him, and its property and assets are in custodia legis. After dissolution it has no power to perform its contracts, even though it is made with third

parties. The rights of the parties are fixed at the date of the dissolution."

56 Minn. 171.

In Mumma vs. Potomac Co., 8 Peters 281, it was held that forfeiture of the charter of a corporation has the effect as the death of a person in taking away its standing in law and in the courts and says:

> "It would be a doctrine new in the law that the existence of a private contract of a corporation should force upon it a perpetuity of existence."

See also Thornton vs. Railway Company,

123 Mass., 32.

Wherein it is said:

> "A company, at the expiration of three years, ceases to have any such existence that no valid judgment could be rendered against it in any action at law."

The case of Hanan vs. Sage, 58 Fed., 651, generally relied upon to sustain the contention that Sage, as trustee, had a right to select land, is not in point as we understand it.

The tract of land involved in that action was within the place limits, and the rights of the Hastings & Dakota Railway Company to that particular land became fixed at the time of the filing of the map of the definite location. The company was the absolute owner of the land involved in that case, and the courts simply held that, during the three years allowed it to wind up its affairs, it could convey this

tract of land, but did not hold that this deed of trust could in anywise prolong the life of the corporation, as it necessarily must, in case it had a right to make any selection in 1891.

The cases heretofore cited show that the indemnity grant gives no vested rights whatever in such land. The right to select could not be transferred by the deed of December 9th, 1899.

It was held in Southern Pacific Railway Company vs. Bell, 183 U. S., 675, as follows:

> "As to the lands within the indemnity limits, the contract was based upon two contingencies—that of losing lands in place and being able to find sufficient to indemnify the company among the odd-numbered sections within a certain further limit of ten miles. Here the interest of the company was so remote and contingent—being a mere potentiality, and not a grant—that the government declined to order a withdrawal for the benefit of the same, or even order a survey within the territory."

Being so remote, how could it be possible that they could be transferred under that deed, even if it had been specifically included within its terms?

I also claim that the case of Humbird vs. Avery, 195 U. S., 480. is authority for the proposition that the Hastings & Dakota Railway Company could not, by its deed, assign to Russell Sage the right to make the selection. At page 507 this court uses the fol-

lowing:

> "UNTIL THE SELECTIONS WERE APPROVED there were no selections in fact, only preliminary proceedings taken for that purpose; AND THE INDEMNITY LANDS REMAINED UNAFFECTED IN THEIR TITLE. Until then the lands which might be taken as indemnity were incapable of identification; the proposed selection remained the property of the United States. The government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts."

Finally it is claimed that because defendant in error never having had possession of the land cannot maintain ejectment.

It is not disputed that the defendant in error, or those under whom she claims have never had possession of this land.

R. L. 1905, Sec. 4073, of Minn., reads:

> "No action for the recovery of real estate, or the possession thereof, shall be maintained unless it appears that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within fifteen years before the beginning of the action."

This has been the law in Minnesota for more than twenty years.

Language could be no plainer. To enable a party to maintain an action for the recovery of real estate such party must have been seized or possessed of the land within fifteen years.

As has been shown, plaintiff in error was living on the tract in dispute when the attempted selection was made, intending to claim it as a homestead, was a qualified homesteader and therefore within the rule and express language of this court in the Froyseth case, (supra) his rights are superior to those claimed under the selection by Sage.

This decision and judgment of the Supreme Court of Minnesota is wrong and should be reversed.

Respectfully submitted,

C. A. FOSNES,

Attorney for Plaintiff in Error.

INDEX.

TABLE OF CASES CITED.

SUPREME COURT OF

THE UNITED STATES

OCTOBER TERM, 1912

No. 756.

RASMUS K. SVOR, Plaintiff in Error.

vs.

CATHERINE M. MORRIS, Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

The case of Weyerhauser vs. Hoyt, 219 U. S. 380, cited by counsel for Defendant in error in his brief and apparently so much relied upon by him is easily distinguishable from the present one, in this, that in the case under consideration the Plaintiff in error was residing on the land at the time of the attempted selection by the Railway Company; in the

Weyerhauser case the claimant was not living on the land. Bearing this distinction in mind it is evident that the Weyerhauser case does not reverse the rule established by this court in the case of Osborn vs. Froyseth, 216 U. S. 571, or the case of Sjoli vs. Dreschel, 199 U. S. 564. After calling attention to the Sjoli case this court in the Weyerhauser case states:

> "It is manifest from the statement we have made that the controversy in this case involves no question whatever concerning the rights of the settlers initiated prior to the filing by the Railway Company of its list of selections, but simply calls upon us to determine whether the land department erred in deciding that a filed list of selections was after approval paramount to a subsequent application to purchase. It is at once demonstrated that the question here involved is wholly different from that which was decided in the Sjoli case."

The real point decided in the Weyerhauser case was that lands lawfully embraced in a list of selections duly filed and awaiting the approval of the Secretary of the Interior could not in the interim be appropriated by others.

It has been the uniform rule of the Land Department "that occupancy of this land prior to the selection of October 29th, 1891, by bona fide settlers who had made application for said land either as timber claim, pre-emption or homestead, either verbally or

by written application, whose applications were refused by the local land officers, excepted said land from the operation of the grant, and also that the making of the pretended selection of October 29th, 1891, and complying with the rules of the department was a waiver and abandonment of all former selections and under the laws of the United States should be and must be confined to lands to which no rights or interests had attached."

8 Land Laws, 362

63 Fed. Rep. 192.

"A claim resting on settlement, residence and improvement existing when the grant becomes effective, is within the excepting phrase 'occupied by homestead settlers.'"

8 Land Laws, 362.

"The exception in the third section of the grant to the N. P. R. R. Co. applies not only to settlers who have made entry but also to these who are entitle to make entry."

10 Land Laws, 427.

"A valid settlement claim existing when the grant becomes effective excepts the land therefrom, and the failure of the settler to place his claim of record, could not be called in question by the company."

11 Land Laws, 274.

Respectfully Submitted.

C. A. FOSNES,

Attorney for Plaintiff in Error.

INDEX.

(23,331)

Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 756.

RASMUS K. SVOR,
Plaintiff in Error,

vs.

CATHERINE M. MORRIS,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF POINT INVOLVED IN THE CASE.

The pith of this case is: Can a man squat upon the public surveyed lands of the United States, neglect to apply to enter the same as a homestead, neglect to bring the fact of his occupancy to the attention of the Land Department, in any way, until about thirteen years after the land is duly selected by a railroad company, and until about seven years after it has been duly patented by the

United States to such railroad company, and the Interior Department has lost jurisdiction over the same, and the patent has become absolute, even as against the Government, have any rights in or to the land as against the patentee.

The plaintiff in error claims that he can have rights. The defendant in error contends that he cannot. The State Court has decided that he cannot. This is an appeal from such decision.

The defendant in error bases her contention on the facts that although the plaintiff in error was in possession of the land on October 29th, 1891, when it was duly selected by the railroad company, to whom it was afterwards patented, and was then duly qualified to take a homestead, he utterly neglected to make any application to enter the same as a homestead, or otherwise, and on the claim that he could not prevent the United States from disposing of the land by merely occupying it, and he was in duty bound to take some step in the local land office by way of application to enter it as a homestead.

STATEMENT OF FACTS.

(a) *Correction.*

In the brief for plaintiff in error, in Assignment of Errors No. 2, the date should be October 29th, 1891, instead of October 29th, 1911.

(b) *Facts on Which Defendant in Error Rests Her Claim.*

On July 4th, 1866, Congress made a land grant to the State of Minnesota for the benefit of the Hastings & Dakota Railway Company. This grant had granted limits of ten miles, and beyond these an indemnity limit of ten additional miles. A peculiar feature of this grant is contained in Section 4 thereof where it is provided "then the Secretary of the Interior shall issue to the State patents for all the lands in alternate sections or parts of sections designated by odd numbers situated within *twenty miles* of the road so completed, and lying co-terminous to said completed section of ten miles, and not exceeding one hundred sections, for the benefit of the road having completed the ten miles as aforesaid." Possibly this, as well as the statutory withdrawal in Section 5 of the act, was provided on account of the manifest enormous deficiency in the granted limits.

The lands reserved from the grant, as appears by Section one thereof, are those which the "United States have sold, reserved or otherwise appropriated, or to which the right of homestead or preemption settlement has attached." Mere oc-

cupancy of land is insufficient to exclude the same from the grant.

This grant, differing from other grants, contains a statutory withdrawal. Section 5 thereof provides that upon the filing of the map of definite location of the road, "then it shall be the duty of the Secretary of the Interior to withdraw from market the lands embraced within the provisions of this act." The land in question is within the twenty miles or indemnity limits of the grant.

The grant was accepted and the entire line was duly constructed and completed by the year 1880, and was duly accepted and certified to the Secretary of the Interior as completed, prior to January 1st, 1881. (Folio 39, of Record.) The Company thereby earned the land. On May 26th, 1883, on account of deficiencies in the primary limits, the railroad company selected this land, with others. The selection was rejected because unaccompanied by a designation of losses. (13 Land Decisions, p. 447.) This selection remained pending on appeal in the Department until October 23rd, 1891. (Id. p. 440.) The land, by the Secretary of the Interior, on April 22nd, 1868, under said *statutory* as distinguished from an *executive* withdrawal, had been withdrawn from the market for the benefit of the Hastings & Dakota Railway Company. (Fol. 39 of Record.)

On December 9th, 1889, Russell Sage, as Trustee, succeeded to all the property and rights and interests of the Hastings & Dakota Railway Company in said land grant, embracing the land in question.

On May 28th, 1891, the Department sought to revoke the statutory withdrawal, but, even if the Secretary had a right to executively revoke a statutory withdrawal, this revocation had no application to the land in question as it was then pending on appeal and was expressly excluded from the revocation. (Fol. 40.)

The Secretary of the Interior, on October 23rd, 1891, in rejecting the railway company's selection of May 26th, 1883, for nonconformity to a rule of the Department requiring designation of losses to be matched tract for tract, held the land "subject to entry by the *first* legal applicant or to selection by the company *first* presenting application therefor, in the manner prescribed by the regulations governing such selections." (13 Land Decisions, p. 447.) Six days after this rejection, and on October 29th, 1891, Russell Sage as Trustee and successor of said railway company, presented another, or rather amended, selection of the land, in which the irregularity in the selection of May 26th, 1883, was corrected. Nearly six years thereafter, and on March 29th, 1897, the land under this selection was certified for the benefit of the railway company by the Secretary of the Interior (Fol. 40), and the land thereafter by mesne conveyances vested in the plaintiff who is the present owner thereof.

In short, the company accepted the grant, which was in the nature of a contract binding on the Government; the lands were withdrawn from the market for the benefit of the company; the road was built and the lands earned; the land was se-

lected as indemnity, and an amended selection made to cure the irregularity in the first selection; the land was certified to the company under the second or amended selection; it sold the land mediately to defendant in error.

(c) *Facts on Which Plaintiff in Error Rests His Claim.*

In 1885, not only while the land was withdrawn from market for the benefit of the railway company, but also while the application of the company to select the same was pending on appeal in the Department, and undetermined, the plaintiff in error attempted to enter the land as a homestead. The local land officers rejected his application. He did not reside on the land at the time, nor did he reside upon it until three years later—in 1888.

Although we contend that this withdrawal was a statutory one and could not executively be revoked by the Secretary of the Initerior, yet, for the sake of the argument, let it be granted that on October 23rd, 1891, when the Secretary directed the land to be held subject to entry by the first legal applicant, or to selection by the railroad company first presenting application therefor, the land was then and by that order put upon the market, still the plaintiff in error made no application to enter the same until January 15th, 1904, about ~~about~~ thirteen years after the land was thrown open to entry or selection, about thirteen years after it was duly selected for the Hastings & Da-

kota Railway Company, about seven years after the land had been certified for the benefit of the railway company under the selection, about seven years after the Land Department of the United States had lost jurisdiction in the premises, and about one year after the patent had become absolute and unassailable, even granting it were void in the first instance. The Department rejected this application.

ARGUMENT.

We contend that the plaintiff in error is not in a position to assail our title derived from the Government.

We claim that in such case as this, one assailing the record title, if he prevail at all, must prevail upon the strength of his claim rather than on the weakness of the title of his adversary.

We claim that the Land Department has *exclusive jurisdiction* for the determination of facts relative to the public lands, notably settlement and improvements thereof, and that a settler having failed to present his claims to the Land Department will not be heard as to such claims in the State Courts, in the first instance.

We claim that even if plaintiff in error were permitted to assail the title of defendant in error, that it is incumbent upon him to *prove* some *error of law* or *fraud* in the Land Department in the issuing of the patent, and do that within six years from the time of the issuance thereof.

A considerable portion of the brief for plaintiff in error is devoted to proving that title to lands in the primary limits passes upon the definite location of the road, and that the title to lands in the indemnity limits passes upon selection. This is well established and conceded, but (thought immaterial in this case) we do not concede as to indemnity selections that the title does not pass until the date of the approval of the selection, as contended on page 13 of the brief for plaintiff in

error; but contend that the title passes as of the date of the selection no matter when the selection is approved. For instance, in this case, when the Secretary of the Interior withheld the approval of our selection from October 29th, 1891, until the 29th day of March, 1897, five years and five months, it would not be fair or good law to hold that in this interim a settler could step in and acquire title to the lands under the homestead laws, when the company by its selection had done all it was required to do, and all that it possibly could do to get the land certified to it. If it were otherwise, then the Secretary of the Interior, whimsically, might withhold his approval forever, and the land grant, piece by piece, be appropriated by settlers after the company had fulfilled its part of the contract by building the road. To the contrary, we contend that the selection of this land by the company on October 29th, 1891, had the effect of withdrawing the land from market until that selection should be finally passed upon by the Department, and that, if approved, the title of the company to the land selected passed as of the date of the selection.

In support of this contention we quote a case decided by this honorable Court, (a later case than any cited in the brief for plaintiff in error,) which distinguishes some of the cases cited in his brief. I refer to the case of Weyerhaeuser v. Hoyt, 219 U. S., 380, cited by Chief Justice Start of the State Supreme Court in the decision of this case. (Page 22, Fol. 43 of Record.) A part of the

opinion in the Weyerhauser case is as follows—as to lands within indemnity limits:

> "The company acquires no interest in any specific sections until a selection is made with the approval of the Land Department; *and then its right relates to the date of the selection.*" * * *
>
> "Under this legislation the company was, by the direction or regulation of the Secretary of the Interior, required to present at the Local Land Office selections of indemnity lands, and these selections, when presented conformably to such direction or regulations, were to be entertained and noted or recognized on the records of the Local office. When this was done the selections became lawful filings; and while, until approved and patented, they would remain subject to examination, and to rejection or cancellation where found for any reason to be unauthorized, they, like all other filings, were entitled to recognition and protection so long as they remained undisturbed upon the records." * * * "What effect has been given to a pending railroad indemnity selection? Prior to 1887 the rights of a railroad company within the indemnity belt of its grant were protected by executive withdrawal; but on August 15, that year, these withdrawals were revoked, and the land restored to settlement and entry; but such orders, although silent upon the subject, were held not to restore lands embraced in pending selections. Dinwiddie v. Florida R. & Nav. Co., 9 Land Dec. 74. In the circular of September 6, 1887 (6 Land Dec. 131), issued immediately after the general revocation of indemnity withdrawals, it was provided that any application thereafter presented for lands embraced in a pending railroad indemnity selection, and not accompanied by a sufficient showing that the land was for some cause not subject to the selection, was not to be accepted, but was to be held subject to the claim of the company un-

> der such selection. In fact a railroad indemnity selection, presented in accordance with departmental regulations, and accepted or recognized by the local officers, has been uniformly recognized by the Land Department as having the same *segregative effect* as a homestead or other entry made under the general land laws."

The case of Osborn against Froyseth, 216 U. S. 571, seems to be the main case on which plaintiff in error relies. It is cited on page 18 of his brief. By reference to the opinion in that case it will be seen that it was decided on the strength of Sjoli v. Dreschel, 199 U. S. 564, which case is also cited and relied on by the plaintiff in error in this case; but in the Weyerhauser case the Court, at least, distinguishes the Sjoli against Dreschel and the Osborn against Froyseth cases. In the Osborn against Froyseth case, a part of the opinion in the Sjoli case is quoted approvingly as follows:

> "That up to the time such approval is given, lands within indemnity limits, although embraced by the company's list of selections, are subject to be disposed of by the United States, or to be settled upon and occupied under the pre-emption and homestead laws of the United States."

But in the Weyerhauser case, a fairer and sounder doctrine is promulgated, as follows:

> "As it is manifest from the statement we have made that the controversy in this case involved no question whatever concerning the rights of a settler initiated prior to the filing by the railroad company of its list of selections, but simply calls upon us to determine whether the Land Department erred in decid-

ing that a filed list of selections was, after approval, paramount to a subsequent application to purchase, it is at once demonstrated that the question here involved is wholly different from that which was decided in the Sjoli case. This difference is as wide as that which would exist between a ruling that one who was prior in time was prior in right, and a directly antagonistic decision that one who was subsequent in time was yet prior in right." * * * "But whilst, according to these decisions, no vested right as against the United States is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acquisition of the land when the United States have determined to sell or donate the property. In all such cases, *the first in time in the commencement of proceedings* for the acquisition of the title, when the same are regularly followed up, is deemed to be the *first in right.*"

But even if the Weyerhauser case does not overrule the Froyseth case, the facts in the Froyseth case are entirely different from the facts in the case at bar. In the Froyseth case the settler went onto the land on May 15th, 1889, and remained there, and when the land was thrown open to settlement on October 23rd, 1891, he, on November 3rd, 1891, being ten days thereafter, made application at the proper land office to enter the same as a homestead, while in the case at bar, the plaintiff in error settled upon the land in 1888, and when the land was thrown open to entry on October 23rd, 1891, *did nothing toward securing it as a homestead, or otherwise, and never brought the fact that he was occupying the land to the*

knowledge of the Land Department of the United States, until the United States had long before disposed of the land to the railroad company in accordance with its rules and regulations, and pursuant to the act of Congress, and until the land department had lost all jurisdiction over the same.

The language of this Court in Maddox against Burnham, 156 U. S. 544, seems very applicable:

> "Leniently as the conduct of a settler is always regarded by the Courts, it cannot be that such leniency will tolerate the omission by him of any of the substantial requirements of the statutes in respect to the creation of rights in the public lands."

The plaintiff in error here has nothing to complain of. While the land was open to settlement and within the jurisdiction of the Land Department, he made no application to enter; he called the attention of the Land Department to no facts to be determined, and to no law to be applied.

In Johnson v. Towsley, 13 Wall. 72, this Court fully conceded that when the officers of the Land Department of the United States decide controverted questions of fact, in the absence of fraud, imposition, or mistake, their decision on those questions is final, except as they may be reversed on appeal in that department.

In Lee v. Johnson, 116 U. S. 48, this Court decided that the findings of fact of the Secretary must be taken as conclusive in the absence of any fraud or imposition, and used the following language:

> "Upon this point it is only necessary to refer to the cases where this conclusive character of the action of the Department upon matters of fact cognizant by it has been expressly affirmed. Johnson v. Towsley, 13 Wall. 72; Shepley v. Cowan, 91 U. S. 330, 340; Moore v. Robbins, 96 U. S. 530, 535; Quinby v. Conlan, 104 U. S. 420, 426; Smelting Co. v. Kemp, 104, U. S. 636,640; Steel v. Smelting Co., 106 U. S. 447, 450."

In the case of Gonzales v. French, 164 U. S. 338, this Court held as follows:

> "As the claim of the plaintiff in error to the land in question was passed upon by the proper local officers of the Land Department, and subsequently, upon appeal, by the Commissioner of the General Land Office, and, upon a further appeal, by the Secretary of the Interior, and as the result of the contest was the granting of a patent to the Probate Judge of the County of Yavapai as trustee of the inhabitants of the town of Flagstaff, the plaintiff, to maintain her bill, *must aver and prove either that the land department erred in the construction of the law applicable to the case, or that fraud was practiced upon its officers, or that they themselves were chargeable with fraudulent practices.*" Johnson v. Towsley, 13 Wall. 72; Moore v. Robbins, 96 U. S. 530; Steel v. Smelting Co., 106 U. S. 447.

On December 9th, 1889, and within the statutory period of three years from March 23rd, 1887, when its franchise was forfeited, the Hastings & Dakota Railway Company duly conveyed to Russell Sage as trustee all its rights and interest in the land in question.

In the decision forfeiting the franchise of the company, State v. Hastings & Dakota Railway

Company, 36 Minn. 246, 263, the Supreme Court of the state says:

> "Undoubtedly the company acquired an absolute right to the lands actually earned as the construction of the road progressed."

In Sage v. Crowley, 83 Minn. 314, the Court says:

> "A settler who enters upon a part of the land granted to a railroad company after they have been withdrawn from settlement, and after the lands have been earned by the completion of the road, *is not in position to attack the company's title.*"

It is hardly necessary to discuss the first claim of error appearing on page 10 of brief for plaintiff in error, to the effect that the Hastings & Dakota Railway Company acquired no rights under the selection of 1883, because, even if granting that the selection of October 29th, 1891, could not be construed as an amendment to the selection of 1883, still the selection of October, 1891, was a valid selection, in and of itself, approved by the Department, and the land was certified pursuant to it.

Construction of State Statute by State Court.

As to the fifth claim of plaintiff in error appearing on page 10 of his brief, that the railway company having ceased to exist on March 23rd, 1890, three years after the entry of the forfeiture judgment, had no right through its trustee or otherwise to select any lands, I would quote from a decision of the Supreme Court of Minnesota, con-

struing this state statute in a case involving this very transfer from the Hastings & Dakota Railway Company to Russell Sage, Trustee, on December 9th, 1889, contrary to the contention of plaintiff in error. It is in the case of Norton v. Frederick, 107 Minn., 36, 41, and is as follows:

> "The company in this case had by the construction of its road earned the lands granted long before its dissolution, and was entitled, if a loss was found within the place limits, to select in lieu thereof a sufficient quantity from the indemnity tract to supply the same. This right became vested immediately upon the completion of the road, and was corporate property within the meaning of the law, subject to sale and assignment. Hanan v. Sage (C. C.), 58 Fed 651; Kansas P. R. Co. v. Atchison, T. & S. F. R. Co., 112 U. S. 414, 5 Supt. Ct. 208, 29, L. Ed. 794; Cedar Rapids & M. R. R. Co. v. Herring, 110 U. S. 27, 39, 3 Supt. Ct. 485, 28 L. Ed. 56; Hastings & Dakota Ry. Co., 18 Land Dec. Dept. Int. 511. This right in the case at bar was conveyed to Sage before the expiration of the limitations prescribed by statute after the dissolution of the corporation, and fully vested in him the right to make such selection of indemnity lands as the corporation could have made, had it not been dissolved. It is not important that the right was assigned to him for the benefit of preferred stockholders, when perhaps it should have been assigned for the benefit of creditors generally. Whether the creditors had rights in the premises does not concern defendant in this case."

We, at the same time, contend that this claim does not present a federal question, and should not be considered by this Court.

Consruction of State Statute by State Court.

As to the sixth claim appearing on page 10 of brief for plaintiff in error, to the effect that the defendant in error having had no possession within fifteen years next before the commencement of the action, could not maintain ejectment, I would call attention to the fact that the legal title to the land remained in the United States until it was certified on March 29th, 1897, (Fol. 40 of Record,) and that this action was commenced that same year, and on October 23rd, 1897, (Fol. 27 of Record,) and further, an extract from the opinion of the Supreme Court of Minnesota in the case of Norton v. Frederick, cited above, which is as follows:

> "The fact that neither plaintiff nor Sage had ever been in the actual possession of the land is not questioned; but, with this conceded fact in mind, we are unable to concur in defendant's construction of this statute. It has always been understood, so far as we are advised, as a statute of limitations, and not as one requiring a plaintiff in an action of this character affirmatively to show actual possession in him as a condition precedent to the right to maintain an action in ejectment. Title and right of possession within the time limited are all that need be shown. Garrett v. Ramsey, 26 W. Va. 345; Seymour, Sabin & Co. v. Carli, 31 Minn. 81, 16 N. W. 495. If actual possession of land within fifteen years is necessary to maintain an action to recover the same from one in actual possession thereof, whether as trespasser or otherwise, the courts would undoubtedly be relieved of considerable litigation, and the transfer of title

to vacant and unoccupied lands would correspondingly decline. No person would be safe in owning vacant and unoccupied land. But the contention of counsel is not sound. The legal title to real property carries with it the right of possession, and this is all that is necessary under the statute to entitle him to maintain an action to recover the same against one in possession thereof without right. It is sufficient until an adverse occupant has remained in possession a sufficient length of time to divest the legal title. If defendant acquired any title or right to the land by reason of his settlement thereon, or the settlement of his predecessor, he should have presented his case to the Interior Department for adjustment."

We, at the same time, contend that this claim does not present a federal question, and should not be here considered.

SUMMARY.

Did not the officers of the department do their duty in rejecting the application to enter of plaintiff in error, in 1885, when he did not reside upon the land, and when the land was not only withdrawn from settlement by the Secretary of the Interior, pursuant to the granting act, but was also included in a railroad company's selection then pending on appeal in the department.

What else could the department do in January, 1904, when the land had been about seven years before certified or patented, than reject the tardy application of plaintiff in error, when they had

many years before lost all jurisdiction in the premises.

The plaintiff in error seeks to attack our title from the Government. It is incumbent upon him to show some error of law or fraud. Surveying the facts and authorities, what error in the construction of the law applicable to the case did the Land Department make? When Congress directed the withdrawal of the land from settlement for the benefit of the grant, the department withdrew it. As long as the land was withdrawn from the market, the department refused applications to enter. After the land became subject to entry, according to its decision, it approved the selection of the railway company. This selection being the only application for the land, it certified it to the company. It denied an application to enter made nearly seven years after the land had been certified and had been out of the jurisdiction of the department. Can it be said that any error of law was committed?

Was there any fraud practiced by or upon anyone? The department certainly showed no haste in approving the selection,—delaying the approval from October 29th, 1891, until March 29th,, 1897. The plaintiff in error during all this time had ample opportunity to present his application to enter, (assuming that the contention of the plaintiff in error is true that he could make an entry at any time before our selection was approved.) He made no such application, and the railway

company is the only one to complain of the delay in the approving.

Inasmuch as it does not appear, in this case, that the Land Department "erred in the construction of the law applicable to the case, or that fraud was practiced upon its officers, or that they themselves were chargeable with fraudulent practices," *and, on the contrary, it does appear that the plaintiff in error never, in any manner, presented his claim to the officers of the land department to whom the law required him to present it,* the record title of the defendant in error from the Government must stand, and the judgment of the State Supreme Court herein should be affirmed.

Respectfully submitted,

OWEN MORRIS,
Attorney for Defendant in Error,
St. Paul, Minn.

U. S.

"It
em-
the
de-
en-
oc-
han

med.

SVOR *v.* MORRIS.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 756. Submitted January 6, 1913.—Decided February 24, 1913.

One who settled on land not at the time open to entry but which became open does not have to go through the idle ceremony of vacating and settling upon it anew.

Where the first selection of lieu lands is rejected as irregular, the land is open during the interval before a new and regular selection is filed, and the homestead right of one who had previously settled thereon in good faith attaches and is superior to that under the new selection.

As between conflicting claims to public lands, the one whose initiation is first in time, if adequately followed up, is to be deemed first in right.

Under the act of May 14, 1880, 21 Stat. 141 and § 2265, Rev. Stat., the rights of a settler who fails to assert his claim within three months of settlement are not inexorably extinguished but only awarded to the next settler in order of time who does assert his claim and complies with the law, and advantage of this statute cannot be taken by a railroad company selecting land which is withdrawn from selection by having already been settled on. *Hastings & Dakota Ry. Co.* v. *Arnold*, 26 L. D. 538, approved.

Title acquired by a railway company or its assignee of lieu lands, im-

properly selected because not open by reason of settlement thereon, is held in trust for the settler by such assignee or his grantee who took with notice.

118 Minnesota, 344, reversed.

THE facts, which involve questions of priority of right between a homestead settler and a railway company selecting lieu lands under a grant, are stated in the opinion.

Mr. C. A. Fosnes for plaintiff in error.

Mr. Owen Morris for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This case presents a controversy over one of the quarters of an odd-numbered section within the indemnity limits of the railroad land grant of July 4, 1866, to the State of Minnesota, which the State transferred to the Hastings and Dakota Railway Company. 14 Stat. 87, c. 168. The trial court gave judgment for the plaintiff, which was affirmed by the Supreme Court of the State, 118 Minnesota, 344, and the defendant prosecutes this writ of error.

The facts material to the controversy are these: In 1883, after the completion of the road, the railway company filed in the local land office an indemnity selection of the tract in controversy, but neglected to comply with an existing regulation requiring that the selection be accompanied by a designation of the loss in the place limits in lieu of which the selection was made. Report Com'r G. L. O. 1879, p. 128, rule V. The selection was rejected by the local officers, but remained pending on successive appeals to the Commissioner of the General Land Office and the Secretary of the Interior until October 23, 1891, when it was finally rejected by the latter

because of that irregularity. Six days later Russell Sage, trustee, to whom the rights of the railway company under the land grant had then been assigned, filed another indemnity selection of the same tract, accompanied by a proper designation of the loss in lieu of which the selection was made, and in that connection claimed and alleged that the tract was then vacant and unappropriated. March 29, 1897, this selection was approved by the Secretary of the Interior, and the tract was certified under the grant, the certification being treated as the equivalent of a patent. 14 Stat. 97, c. 183. The plaintiff subsequently acquired the right and title of Sage, trustee, to the tract, but did so with full notice and knowledge of the occupancy and claim of the defendant.

In 1885 the defendant applied at the local land office to make a homestead entry of the tract and the application was denied, the circumstances being such that it could not be allowed. In 1888, while the selection of 1883 was pending, he settled upon the tract with the purpose of acquiring the title by compliance with the homestead law, and continuously thereafter resided upon the tract, occupied, improved and cultivated it, all the time asserting a claim under that law. The improvements which he made exceeded $2,000 in value and the area which he reduced to cultivation exceeded 100 acres. Being continuous, his occupancy and claim covered the interim between the final rejection of the first indemnity selection and the filing of the second one, but he did not again apply at the local office to make a homestead entry until 1904, which was after the tract had passed beyond the jurisdiction of the Land Department by the certification under the land grant. At the time of his settlement, and continuously thereafter, he possessed all the qualifications requisite to acquire the title as a homestead claimant.

The plaintiff's title receives no support from the indemnity selection of 1883, for, as has been seen, it did not

conform to the existing regulations in an essential particular and was finally rejected, October 23, 1891, for that reason. And to avoid an extended statement and discussion respecting an indemnity withdrawal made in 1868 and still another claim to the tract, both of which were terminated on or shortly before October 23, 1891 (see H. R. Ex. Doc. 246, 50th Cong., 1st Sess.; 26 Stat. 496, c. 1040, § 4; *St. Paul & Sioux City R. R. Co.*, 12 L. D. 541; *Creswell Mining Co.* v. *Johnson*, 13 L. D. 440), it will be assumed, without so deciding, that the defendant's claim receives no support from what he did anterior to that date.

Following the final rejection of the first selection there was an interval of six days in which the land was not only free from any claim under the land grant but open to settlement under the homestead law. So, apart from the defendant's earlier efforts, there can be no doubt that by his residence and occupancy during that interval he initiated and acquired a homestead right. He was not disqualified by reason of what he had done before, and, of course, it was not necessary that he should go through the idle ceremony of vacating the land and then settling upon it anew. This is the view uniformly applied in the Land Department. *Central Pacific Railroad Co.* v. *Doll*, 8 L. D. 355; *La Bar* v. *Northern Pacific Railroad Co.*, 17 L. D. 406; *Vandeburg* v. *Hastings & Dakota Railway Co.*, 26 L. D. 390. See also *Moss* v. *Dowman*, 176 U. S. 413. The second selection came after this homestead right had attached and therefore was subordinate to it. In its facts the case is like *Sjoli* v. *Dreschel*, 199 U. S. 564, and *Osborn* v. *Froyseth*, 216 U. S. 571, and unlike *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, and *Northern Pacific Railway Co.* v. *Wass*, 219 U. S. 426, and yet is within the principle recognized and enforced in each, viz., that as between conflicting claims to public lands the one whose initiation is first in time, if adequately followed up, is to be deemed first in right. The *Sjoli* and *Osborn* cases involved con-

flicts between claims initiated by homestead settlement and claims resting upon railroad indemnity selections subsequently filed, and because the former were first in time they were held to be superior in right. The *Weyerhaeuser* and *Wass* cases presented conflicts between railroad indemnity selections and claims initiated, one by an application to purchase under the Timber and Stone Act and the other by a homestead settlement, while the selections were pending, and it was held that the selections gave the better right because they were first in time.

That in point of residence, improvements and cultivation the defendant fully complied with the homestead law is not questioned, but it is contended that he lost his claim by not asserting it in due time at the local land office. It is true that the act of May 14, 1880, 21 Stat. 141, c. 89, § 3, in connection with Rev. Stat., § 2265, fixed three months from the date of settlement as the time within which the claim should be asserted at the local land office, and that the defendant did not conform to this requirement; but that is not a matter of which advantage can be taken by one who stands in the shoes of the railway company, as does the plaintiff. The statute does not contemplate that such a default shall inexorably extinguish the settler's claim, but only that the land shall be "awarded to the next *settler* in the order of time" who does so assert his claim and otherwise complies with the law. As was said by this court in *Johnson* v. *Towsley*, 13 Wall. 72, 90: "We think that Congress intended to provide for the protection of the first settler by giving him three months to make his declaration, and for all other settlers by saying if this is not done within three months any one else who has settled on it within that time, or at any time before the first settler makes his declaration, shall have the better right." The question has been repeatedly considered by the Secretary of the Interior in connection with railroad indemnity selections of lands covered by existing homestead settle-

ments which had not been asserted at the local office within the time prescribed, and his ruling has been that "A failure to file an application to enter lands within three months after settlement forfeits the claim to the next settler in order of time, but such default is not one that can be taken advantage of by a railway company." *Missouri, Kansas & Texas Railway Co.* v. *Troxel*, 17 L. D. 122, 124; *Hastings & Dakota Railway Co.* v. *Arnold*, 26 L. D. 538, 540. We regard that ruling as resting upon a proper conception of the statute.

Had the real facts been disclosed to the Land Department, viz., that the defendant was residing upon and occupying the land in virtue of a lawful homestead settlement antedating the second indemnity selection, it would have been the duty of the Secretary of the Interior to disapprove the selection, and no doubt he would have done so. But the real facts were not disclosed. On the contrary, it was claimed and alleged by the agent who acted for Sage, trustee, in making the selection, that the land was then vacant and unappropriated, and on that representation the Secretary's approval was given. Thus, the title was wrongfully obtained by one who was not entitled to it, and another who had earned the right to receive it was prevented from obtaining it when subsequently he came to assert his right before the Land Department. Whatever may have been the cause of the defendant's delay in so asserting his right, there is no suggestion that he either knew of or acquiesced in the representation that the land was vacant and unappropriated, or that he was in any wise apprised of the filing, pendency or approval of the second selection until after the land had passed out of the jurisdiction of the Land Department by the certification under the land grant. In short, the proceeding was essentially *ex parte*, and he was neither heard nor given an opportunity to be heard.

In these circumstances we think it is a necessary con-

clusion that the title acquired by Sage, trustee, was held by him in trust for the defendant, and that it is now held upon a like trust by the plaintiff, who took with full notice and knowledge of the defendant's occupancy and claim. *Rector* v. *Gibbon*, 111 U. S. 276, 291; *Widdicombe* v. *Childers*, 124 U. S. 400, 405; *Duluth & Iron Range Railroad Co.* v. *Roy*, 173 U. S. 587.

As the state courts proceeded upon the theory that the second selection gave the better right notwithstanding the defendant's claim was first in time, the judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed.